Supreme Court, U.S.
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NO. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CITY OF CABOOL, MISSOURI and ALDERMEN JAY GENTRY AND JERRY ROBERTS,

Petitioners,

v.

JOHN C. CASEY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Donald W. Jones
Counsel of Record
Timothy E. Gammon
HULSTON, JONES, GAMMON & MARSH
2060 East Sunshine
Springfield, Missouri 65804
Telephone: (417) 887-1858
Facsimile: (417) 887-3029

Attorneys For Petitioners

99 pp

QUESTIONS PRESENTED

1. Was the discharge of a police dispatcher (who earlier had resigned as fire chief and agreed to stay out of fire department operations, but who continued to disrupt the Fire Department, and confronted the City Administrator with false allegations of dishonesty against the City Clerk and Mayor in an attempt to coerce the City to allow the dispatcher to set fire department policies) for insubordination, breach of his agreement, breach of the chain of command, and disruption, a violation of the dispatcher's First Amendment free speech rights and actionable under 42 U.S.C. § 1983? And did the federal courts below, under Connick v. Myers, and Waters v. Churchill, fail to defer to the local government officials?

2. Is a conversation to be divided into "public concern" and "private concern" categories, or must it be considered as a whole to be either "public concern" or "private concern", an issue on which there is an acknowledged split among the Circuit Courts as recognized in Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 147 (2d Cir. 1993).

3. Did the Eighth Circuit below err in failing to consider, and find, under University of Tennessee v. Elliott, that the discharge appeal hearing decision, in which the dispatcher's free speech challenges were denied, constituted a final decision, when not appealed under the Missouri Administrative Procedure Act (RSMo. §§ 536.010 et seq.), and that such decision cannot be collaterally attacked under 42 U.S.C. § 1983?

4. Where the dispatcher sued for $200,000.00 and received a jury verdict and

judgment for only $18,888.00 (less than 10% of the amount claimed), did the federal courts below err, under Farrar v. Hobby, in awarding more than $80,000.00 in attorneys' fees?

List of Parties

All parties to the lawsuit are named in the caption, and there are no parent or subsidiary companies.

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINION

The opinion of the Court of Appeals appears in the Appendix filed herewith and is reported at 12 F.3d 799. (Supreme Court Appendix [hereinafter S.Ct.App.])

JURISDICTION OF THE SUPREME COURT

The U.S. Court of Appeals for the Eighth Circuit Panel Opinion was filed December 28, 1993 and timely Suggestions for Rehearing were filed January 7, 1994 and denied by the Court, with three Judges dissenting. An amended Panel Opinion was filed in April 1994, now reported at 12 F.3d 799, and the Eighth Circuit allowed Petitioners-Appellants to file Suggestions for Rehearing following the amended Panel Opinion. The Eighth Circuit, by order of May 13, 1994, denied those Suggestions for Rehearing and Rehearing En Banc, and this Petition follows.

Jurisdiction in the Supreme Court to review the judgment of the Eighth Circuit is invoked pursuant to this Court's Rule 13 and 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

First Amendment, U.S. Constitution: "Congress shall make no law...abridging the freedom of speech...."

42 U.S.C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory...subjects, or causes to be subjected, any...person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

Missouri Administrative Procedures Act (Chapter 536 Missouri Revised Statutes: Included in Appendix

STATEMENT OF THE CASE

A. Nature of the Suit

Respondent John Casey sued the City of Cabool, Missouri, a town of 2,800,[1] and two City Aldermen, Jay Gentry and Jerry Roberts, individually and in their official capacities, for wrongful job termination (App. 5-10), in the United States District Court for the Western District of Missouri asserting jurisdiction under 42 U.S.C. § 1983. Following a judgment of $18,888.00 based on the jury verdict, and an award of approximately $68,035.39 in attorneys' fees under 42 U.S.C. § 1988, Petitioners appealed to the United States Court of Appeals, Eighth Circuit pursuant to 28 U.S.C. § 1291.[2] Following affirmance and denial of rehearing with three Judges voting for rehearing, this Petition was filed pursuant to 28 U.S.C. § 1254(1).

B. Statement of the Facts

1. Background of John Casey's Employment History as a Police Department Dispatcher Prior to May 1990

John Casey was hired as a dispatcher initially under a job training program, but after July 1981 he was paid from the police department budget. (T.V. 1, p. 118-19; T.V. 2, p. 137, 205, 270, 274-76)

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[1] (Trial Transcript Volume 2, page 270 line(s) 24-25 [hereinafter T.V. ___, p. ___, l. ___; additional references are to the record filed with the Eighth Circuit including, Appellants' Appendix, Defendants' Trial Exhibit(s), Addendum and Appellants' Brief [hereinafter App., Def. Tr. Ex., Add. and A.B. respectively])

[2] By order of June 8, 1994, the Eighth Circuit awarded Plaintiff an additional $13,567.46 in attorneys' fees and costs.

Casey also became Fire Chief but resigned because of problems. (T.V. 1, p. 131, 139) In return he requested and was reinstated as full-time police dispatcher on September 17, 1983. (T.V. 1, p. 137, 157; Def. Tr. Ex. 36, 41).

At a Cabool Board of Aldermen executive session on February 18, 1986, Mayor Cartwright brought up complaints "about John Casey being at fires and making comments and also [having] caused problems by attending fire department meetings." (T.V. 2, p. 216-17, 224-26; See Def. Tr. Ex. 2, 20; Add. 43) Casey understood the basis of the complaints and that the City Administrator believed Casey's criticism of fire department operations would "undermine the effectiveness of the departments." (T.V. 1, p. 155-56) Casey received a warning (personnel action notice), and a letter signed February 19, 1986 by John Casey and Police Chief Lynn Jones, Casey's immediate job supervisor, was placed in Casey's file. (T.V. 1, p. 158)

Casey understood the letter he signed stated he was not to attend fires, make policy for the fire department, or involve himself in the Fire or other City Departments unless asked, and that failure to comply would be grounds for his immediate dismissal as a police dispatcher.[3] (T.V. 1, p. 157) From the time of the February 1986 letter forward, the City Administration wanted Casey to stay out of, and to disassociate himself

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[3] Judge England, the trial Judge, held that personnel action/warning letter did not constitute a prior restraint of speech. (T.V. 4, p. 166-67)

from, the fire department.[4] (T.V. 3, p. 121-22; Casey Depo. p. 30-32; App. 60-62; Casey Depo. p. 68; App. 32; See also Gentry Depo. p. 12-13; App. 66-67)

The February 19, 1986 letter was pulled from Casey's file in June 1988, upon motion and second by Aldermen Jay Gentry and Jerry Roberts, at Casey's request. (T.V. 1, p. 160; Def. Tr. Ex. 20; Casey Depo. Ex. 21; App. 99-100) It was pulled to open job possibilities for Casey. (T.V. 3, p. 182) But Lynn Jones explained to Casey (and Casey understood) the prohibitions in the letter were not nullified by its removal from his file. (T.V. 2, p. 150)

Jones also had problems with Casey's scheduling. (T.V. 2, p. 151) Tension existed between Jones' department and the City Clerk's office because Casey did not fill out and turn in his time cards as directed. (T.V. 2, p. 207-08, 229) Those problems still existed in May 1990. (T.V. 2, p. 153)

2. The May 3, 1990, Conversation Between Casey and MacPherson

John Casey went in to see Michael MacPherson, the Cabool City Administrator, a

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[4] While Fire Chief, Casey broke the lock on a City door, at a fire department meeting, to obtain cleaning supplies for the fire department, although the supplies belonged to the City not the fire department. (T.V. 2, p. 225, 242, 255) He also took the lead fire truck outside the City (T.V. 2, p. 256; T.V. 3, p. 70, 260), although on September 7, 1983 he was directed by written memoranda not to do so. (T.V. 1, p. 120-22; Def. Tr. Ex. 4) Casey resigned not just as Fire Chief but from the fire department on September 17, 1983 (T.V. 1, p. 140), and agreed to stay away from the fire department and leave its affairs to others. (See Def. Tr. Ex. 20) Thereafter Casey was directed not to go to any fires (T.V. 1, p. 146), but he did. (T.V. 1, p. 147-48; Def. Tr. Ex. 55) Casey also breached the agreement by attending fire department meetings after he resigned as Fire Chief. (T.V. 2, p. 263)

few minutes before 5:00 P.M. at MacPherson's office in City Hall. (T.V. 1, p. 76) The exchange was interrupted when Casey went across the street to the Police Station to begin his shift at 5:00 P.M. (T.V. 1, p. 77-78) MacPherson followed and the exchange resumed. (T.V. 1, p. 91; T.V. 3, p. 243)

Casey said he was concerned about possible increase in his own fire insurance premiums which would result if certain fire department practices were not changed.[5] (See T.V. 1, p. 80-82) Casey admitted his talk to MacPherson was in his own personal interest. (T.V. 4, p. 72) Casey hoped to save "70 bucks" (T.V. 4, p. 91), by getting the City to change its policies so it would sent its lead fire truck to rural fires outside the City, and not charge Casey for rural fire calls. (T.V. 1, p. 79-80; Casey Depo. p. 83, 91-96; App. 33, 34-39) Despite his agreement not to meddle in fire department operations, Casey said he had talked to the Insurance Service Organization, which sets fire insurance rates, and told them the City was changing procedures. (See Def. Tr. Ex. 20; T.V. 1, p. 82, 84)

Casey then implied that State Auditor, Margaret Kelly, should be called. (T.V. 1, p. 93) Casey said that would be bad because Kelly finds things wrong wherever she goes and "we wouldn't want the negative publicity in Cabool to have her here." (T.V. 1, p. 93, 95; See Casey Depo. p. 106; App. 40)

MacPherson described Casey's presentation as disrespectful, insubordinate, agitated, confrontational and domineering. (T.V. 3, p. 218) MacPherson felt Casey was trying to

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[5] Casey lived outside the City limits of Cabool, but had rental properties in the City, which he insured. (See T.V. 1 p.72; Casey Depo. p. 91, 128, 140)

intimidate, threaten and blackmail him into bowing to Casey's demands regarding the fire department. (T.V. 3, p. 245) Casey said:

(1) Billie Stewart, the City Clerk, who he referred to as "Miss Cabool," had misappropriated City crews and equipment by improperly calling the City to fix her sewer (T.V. 1, p. 95; MacPherson Depo. p. 78, 80; App. 81, 83; Casey Depo. p. 106, 109, 119; App. 40, 41, 42);

(2) Brian Stewart, her son and a volunteer fireman, had shown up at a fire intoxicated (T.V. 1, p. 99-100; T.V. 2, p. 18; MacPherson Depo. p. 88; App. 84; Casey Depo. p. 61; App. 31);

(3) the firemen were incompetent (MacPherson Depo. p. 91, 100-01; App. 85, 87-88);

(4) Mayor Hardy had lied when he allegedly told Casey he would not reappoint Billie Stewart as City Clerk if he were reelected, but then had been reelected and had reappointed her (T.V. 3, p. 210); and

(5) the Board of Aldermen were illegally charging for rural fire calls. (T.V. 3, p. 208-10)

Casey's accusations against Billie Stewart and her son, Brian, and against Mayor Hardy were false.[6] After the conversation, that

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[6] The fact that Casey's accusations were false is not seriously disputed. Casey admitted he had no belief that Billie Stewart or her son, Brian, had done anything wrong or criminal. (T.V. 2, p. 9, 14, 15) Billie Stewart had done nothing improper. (T.V. 2, p. 279-80) She paid for all charges for repairs to her house. (T.V. 2, p. 283) MacPherson saw the checks Billie Stewart wrote for work at her house. (T.V. 3, p. 213)

At his post-termination hearing (Def. Tr. Ex. 13 testimony of Casey; p. 76 and 80), Casey testified that Mayor Hardy said Stewart was going to retire (T.V. 1, p. 102), but later, responding to a different question

same day, Casey said to Lynn Jones, "its been nice working for you", which Jones took to mean Casey knew he had gone too far. (T.V. 2, p. 143) Casey confided in Tom Whittaker, a volunteer fireman, that he was not concerned about getting fired because, "He (Casey) could get the City to fire him and come back and sue them." (T.V. 2, p. 75, 80) Casey told Lynn Jones he planned to quit to pursue his own business in the fall of '89, and then in December, that he planned to quit in the spring of 1990. (T.V. 2, p. 141)

3. MacPherson's Investigation, Presentation to the Board and the Board of Aldermen's Consideration and Action

MacPherson investigated Casey's allegations, contacting the City attorney, Lynn Jones, Billie Stewart, and Mayor Hardy and looking at Casey's personnel files, and past Board minutes regarding personnel actions taken against Casey. (T.V. 3, p. 192, 199, 212, 258, 272)

Jones told MacPherson that Casey's usurpations, in other City Departments, were nothing new and that Casey had a continuing history of interfering. (T.V. 2, p. 157, T.V. 4, p. 35); MacPherson Depo. p. 31, 32; App. 70, 71) Casey's frequent attacks on other City Departments affected morale and undermined their efficiency. (T.V. 2, p. 177-78) Jones also had problems with Casey's record keeping and could not understand how much time Casey was working and how much time he was taking off. (T.V. 2, p. 152)

Casey said there was "no relevance to him (Hardy) saying that he was not going to appoint her city clerk." (T.V. 2, p. 23) MacPherson explained Casey's point was that Mayor Hardy had not done what he said he would do, that is "he [Mayor Hardy] lied." (T.V. 3, p. 210)

Mayor Hardy never said he would not reappoint Billie Stewart. (T.V. 3, p. 116) Hardy told MacPherson "we've gone far enough, I want him [Casey] removed." (MacPherson Depo. p. 116; App. 91; See also T.V. 3, p. 109-10) Mayor Hardy previously had investigated the claims about Billie Stewart. (T.V. 3, p. 105-06, 108) Mayor Hardy was concerned Casey's statements would cause disruption. (T.V. 3, p. 110)

Casey had also told Lynn Jones about Billie Stewart's alleged wrong doing, (T.V. 2, p. 139, 180-81), and made other complaints, (Def. Tr. Ex. 20; T.V. 2, p. 189-90; Add. 43), but Casey never gave Jones any proof of his accusations. (T.V. 2, p. 139) Other City employees had complained to Jones about Casey usurping authority. (T.V. 2, p. 146, 176)

4. MacPherson's Report to Board of Aldermen and Their Vote to Terminate Casey.

Because MacPherson felt his investigation established that Casey had exhibited insubordination and disloyalty (MacPherson Depo. p. 52, 53, 70; App. 73, 74, 78), had violated the 1986 directive, to Casey, not to meddle in other City Departments, and had presented his false and disruptive remarks outside the chain of command,[7] MacPherson

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[7] The chain of command problem was as follows: Lynn Jones was Casey's supervisor, thus Casey's contact in the chain of command. (T.V. 1, p. 188; Casey Depo. p. 40; App. 63) Rather than present complaints to Jones, Casey confronted MacPherson, and at various times Mayor Hardy and Aldermen Roberts and Purvis about the Stewarts. (T.V. 2, p. 16-17; Casey Depo. p. 120, 123; App. 43, 44; See also T.V. 3, p. 107) Lynn Jones had never told Casey to go to those others about the Stewarts (Casey Depo p. 137; App. 47; See T.V. 2, p. 16-17)

brought the matter up at the May 7, 1990 board meeting. (T.V. 3, p. 214-16)

Based on MacPherson's recommendation,[8] the Board terminated Casey's employment as a police dispatcher. (T.V. 3, p. 141, 182-83; Gentry Depo. p. 37; App. 68) The two Aldermen who voted to terminate, Petitioners Gentry and Roberts, were concerned that what Casey said was slanderous but had no ill will or malice toward Casey.[9] (T.V. 3, p. 172-83) Casey's false accusation was part of the reason Brian Stewart resigned as a volunteer fireman. (T.V. 3, p. 245) Billie Stewart testified Casey's accusations caused disruption. (T.V. 3, p. 284) MacPherson would

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Casey knew the chain of command required him to go through his superior, Police Chief Lynn Jones, with problems he had with other City employees. (T.V. 1, p. 185-86; T.V. 4, p. 96; Casey Depo. p. 149-50; App. 50, 51) and that going outside the chain of command could be viewed as insubordination. (T.V. 1, p. 186) Casey even admitted his wife advised him not to talk to MacPherson in the manner he did. (T.V. 4, p. 93)

[8] MacPherson recommended termination based on Casey's prior problems, entire record and insubordination. (T.V. 3, p. 162, 198; See Gentry Depo. p. 37; App. 68; Roberts Depo. p. 16; App. 96) Disrespect and insubordination are grounds for discipline or termination under the City Code. (T.V. 4, p. 26; Def. Tr. Ex. 27) MacPherson reviewed Casey's personnel file and history of problems at the executive session, including the facts Casey had been delinquent in paying tax bills, and for curb and gutter improvements to his property. (T.V. 3, p. 141, 198, 219, 236) Failure to pay debts is, under the Cabool City Code, grounds for discipline or termination. (T.V. 4, p. 26; Def. Tr. Ex. 27) The only other City employee with a delinquent tax bill paid it within two days of notification (T.V. 3, p. 221), while Casey did not pay his delinquent bills for three to five months. (T.V. 3, p. 219-20)

[9] Casey had no reason to doubt they simply followed MacPherson's recommendation, without any malicious intent. (Casey Depo. p. 12-14; App. 57-59)

have recommended terminating Casey (T.V. 4, p. 26-27), and the Aldermen would have voted to terminate Casey, disregarding the content of the May 3, conversation because of Casey's history of problems, disruption, and insubordination. (T.V. 4, p. 107-08, 114-15)

5. The Post-Termination Hearing

Casey was notified of his termination by letter of May 8, 1990, and placed on paid leave pending appeal. (T.V. 1, p. 109; Casey Depo, Ex. 15; App. 104) Casey requested an appeal by letter of May 15, 1990. (Def. Tr. Ex. 15) A public hearing, pursuant to City ordinances, was conducted on June 7, 1990. (T.V. 3, p. 225, 229; Def. Tr. Ex. 16)

Casey was represented by an attorney and allowed to present evidence and testimony; there was cross-examination and recording of testimony. (Def. Tr. Ex. 13) The witnesses were sworn. (T.V. 4, p. 46) Mayor Pro Tem Don Wells, who had not participated in the termination, was appointed to preside at the public post termination hearing. (Def. Tr. Ex. 16) Following the hearing, Wells issued a decision (Supreme Court Appendix pp. ____,) finding Casey had been warned and counseled on numerous occasions for failing to follow orders, and interfering, and that Casey's statements constituted serious insubordination. Wells recommended that Casey's termination be affirmed and request for reinstatement be denied.

Under the Missouri Administrative Procedure Act, that decision was subject to judicial review. (Chapter 536 of the Missouri Revised Statutes)[10] Judicial review was not

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[10] The Trial Court took judicial notice of Chapter 536. (T.V. 4, p. 144)

sought in the Missouri State courts.[11] Rather the instant suit was brought in federal court, alleging the termination was for protected free speech. (App. 5-8) The constitutional claim had been raised by Casey's attorney, Peggy Hedrick, at the post-termination hearing when she argued:

> And if you fire somebody for saying things who is in one of these jobs whose job performance is adequate, you're violating your First Amendment right. And I believe that the City of Cabool violated John Casey's First Amendment right. And the testimony from Mr. MacPherson and Mr. Purvis and the Chief all supported this. I don't think John had to say a thing. I think that their testimony was they fired him because of things he said. And they can't do that unless he's broadcasting over the air as a Dispatcher libelous things that are going to get the City in trouble.

(Def. Tr. Ex. 13 at p. 85-86)

6. The Verdict

Casey sued for $200,000.00. His punitive damages claim of $100,000.00 was dismissed by summary judgment. At trial his counsel asked the jury for 30 months back pay and 12 months front pay based on his annual salary of

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[11] Under Missouri's Administrative Procedure Act decisions in "contested cases" may be appealed to circuit court within 30 days. RSMo. § 536.100. Other decisions may be appealed under RSMo. § 536.150. Decisions of City agencies or tribunals are treated as administrative agency decisions. State ex rel City of Springfield v. Crouch, 687 S.W.2d 639 (Mo.App. 1985)(contested case); Snelson v. Board of Police Comm'rs, 859 S.W.2d 794 (Mo.App. 1993)(contested case).

approximately $12,000.00, plus $247.00 medical insurance and 13% retirement paid by the City, seeking a total of $67,000.00. (T.V. 1, p. 111; T.V. 5, p. 25) The jury awarded him $18,888.00 (App. 189), and the Trial Court awarded Respondent approximately $70,000.00 in attorneys' fees and costs.[12] (App. 352-57)

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

The threshold issue is whether the First Amendment protects a police dispatcher, who continues to usurp authority and interfere with other City Departments, from termination. Casey went to the City Administrator outside the chain of command to argue about matters outside his own department. His threats to call the State Auditor were obviously to intimidate the City Administrator to grant him authority that he did not have. Casey admittedly had no true facts to justify it, but accused the City Clerk of misappropriating City equipment and crews, her son, a volunteer fireman, of showing up at a fire intoxicated, the Mayor of lying in saying he would not reappoint the City Clerk when thereafter he did, the City Administration of illegality in charging for

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[12] The Trial Judge gave no indication whether he would declare the statements of Casey on May 3, 1991 were protected or unprotected until the evidence from both sides was largely completed. Then the Court declared that he would not segment the conversation but that he was holding the entire conversation and speech of Casey constituted protected speech. At urging of Plaintiff's counsel, the Court ruled it was not reckless. See, however, footnote 6 above. The jury instructions therefore virtually directed a verdict for the Plaintiffs, and refused to allow Defendants' tendered instructions to allow the jury to determine whether Casey's false statements were recklessly made.

rural fire calls and considering fee changes, and the Volunteer Fire Department of incompetency, admittedly in his own personal interest in saving $70.00. The decision below is in direct conflict with Janusaitis v. Middlebury Volunteer Fire Dept., 607 F.2d 17 (2d Cir. 1979).

The Trial Court failed to recognize the limits to the First Amendment's protection under Connick and Pickering, specifically in failing to rule that Casey's insubordination was not protected, and in failing to segment portions of the conversation that were only of private concern and refusing to submit Petitioners' instructions that Casey's statements concerning Mayor Hardy, Billie Stewart and Brian Stewart were maliciously false and recklessly made. The Trial Court should have deferred to the decision of the Aldermen on whether the statements of Casey were of public concern and disruptive.

The Courts below should have dismissed the instant suit for failure to exhaust state remedies and/or under the doctrines of res judicata, claim preclusion, or estoppel.

The Trial Court also erred, inter alia,[13] in failing to reduce the fee request based on the Petitioner's limited success, and awarding excessive attorneys' fees.

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[13] Additional trial errors not developed in this petition because of space limitations include: (1) Allowing Respondent to amend the petition five days prior to trial to claim front pay without allowing Petitioners' discovery; (2) Refusing to voir dire the jury regarding Respondent's wife's wheelchair condition; (3) Allowing Respondent to ask indemnity questions of Petitioners Gentry and Roberts, and payment of attorney fee questions of Respondent; (4) Failing to reduce the verdict by the unemployment compensation Respondent received.

ARGUMENT

I. The Decision Below Conflicts With Other Circuit And Supreme Court Decisions, In Failing To Properly Balance The Interests Of Local Government Employers In Maintaining Efficiency, And Orderly Conduct, By Fire And Police Department Personnel, With The Free Speech Rights Of Those Employees.

A police or fire department has a substantial role in developing "discipline, esprit de corps, and uniformity" within its ranks to ensure the safety of persons and property. Kelley v. Johnson, 425 U.S. 238, 246-47 (1976).[14] In Janusaitis v. Middlebury Volunteer Fire Dept., 607 F.2d 17, 26-27 (2d Cir. 1979) the court upheld a volunteer fireman's dismissal because he submitted to the Executive Committee a report charging that the department suffered from low morale, that training and discipline was inadequate, that accounting procedures deviated from generally accepted accounting principles,[15] and that his recommendations had been ignored. The Court found Janusaitis intended "to change the operation of the Department and undermine the authority of its officers," even though Janusaitis proclaimed the innocent motive of advancing Department efficiency and professed an absence of ill-will. The Court concluded that "plaintiff emerges as one more concerned with proving himself right and every one else wrong than with truly promoting the welfare and efficiency of the Department." 607 F.2d at 16. The Second Circuit, balanced interests to

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[14] This was recognized in Hughes v. Whitmer, 714 F.2d 1407, at 1419 (8th Cir. 1983) cert. den. 465 U.S. 1023 (1984).

[15] Janusaitis was an accountant by profession. 607 F.2d at 18.

find that the report by Janusaitis, and his threats to go to IRS, were not protected. (607 F.2d pp. 26-27)

The Eighth Circuit decision below, 12 F.3d at 803-04, overlooks the "esprit de corps" consideration. Because Janusaitis has been followed, or cited with approval, in a number of subsequent decisions, the decision below is also in conflict with those decisions.[16]

The decision below is remarkably like that at 507 F.Supp. 572 (E.D.La. 1981), aff'd, 654 F.2d 719 (5th Cir.), which was reversed in Connick v. Myers, 461 U.S. 138 (1983). The decision below, at 12 F.3d p. 802 states:

> Because Casey's speech amounted to straightforward criticism of government officials and policy, we hold that it falls squarely within the meaning of "speech on a matter of public concern."

But Justice White's opinion in Connick pointed out at 461 U.S. p. 143:

> The District court got off on the wrong foot in this case by initially finding that, "[t]aken as a whole, the issues presented in the questionnaire relate to the effective functioning of the District Attorney's office and are

---

[16] See, e.g., Martin v. Lauer, 686 F.2d 24, 31 n.32 (D.C.Cir. 1982) (citing Janusaitis as holding the unique nature of the agency was an essential consideration); Santos v. Miami Region, U.S. Customs, 642 F.2d 21, 25 (1st Cir. 1968) ("Criticisms made with malice or with knowledge that they contained falsehoods may not be protected."); Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 54 (2d Cir. 1987); Versarge v. Township of Clinton, 984 F.2d 1359, 1367 (3rd Cir. 1993) Wren v. Jones, 635 F.2d 1277, 1285 (7th Cir. 1980) (citing Janusaitis as properly applying the Pickering balancing test); Hughes v. Whitmer, 714 F.2d 1407, 1419 (8th Cir. 1983), cert. den., 465 U.S. 1023 (1984).

matters of public importance and concern." 507 F.Supp. at 758.

Recognizing that government offices can not function "if every employment decision became a constitutional matter," Justice White stated:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to employee behavior. . . .[17]

Justice White found the questions posed by Myers to her co-workers did not, "fall under the rubric of matters of public concern," but rather were "mere extensions of Myers'

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[17] 461 U.S. at 143.

Pointedly, the court in Sharpe v. Long, 8 IER Cases 798, 802 (D.S.C. 1992) explained, "[W]e will not become entangled in every employment dispute merely because allegations involving free speech arise. The Constitution simply does not guarantee public employment unsullied by the potential for silly and at times unjustified termination or transfers unless premised upon specific forbidden grounds." Here, both the federal Trial Court and Court of Appeals stepped in, substituting their judgment for that of the Board, and Aldermen.

As the Supreme Court explained in Harlow v. Fitzgerald,, 457 U.S. 800 (1982), the threat of personal liability could deter all but the most resolute or irresponsible from discharging their public duties, or even from being willing to serve in public office. 457 U.S. at 813.

dispute over her transfer," a situation where "additional weight must be given to the supervisor's view[18] that the employee has threatened the authority of the employer to run the office." 461 U.S. at 148-50, 153. The opinion concluded at 461 U.S. pp. 153-54, that because the questionnaire touched upon public concern only in a limited sense,[19] the

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[18] Although the Myers questionnaire did not impede her ability to perform, Justice White found that it was Connick's judgment that Myers' actions constituted insubordination. Then Justice White at 461 U.S. pp. 152-53, explained:

> When close working relationships are essential, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. . . .

See also Arnett v. Kennedy, 416 U.S 134, 168 (1974) (recognizing the essential rights of government employers to remove employees whose conduct hinders efficient operation, and to do so with dispatch, to protect discipline and morale and prevent disharmony and ultimate impairment of agency efficiency).

[19] Justice White found only one item "touching on a matter of public concern, the issues of compelling political support by public employees," but held that one issue required the Court to determine, "whether Connick was justified in discharging Myers:"

> Here the District Court again erred in imposing an unduly onerous burden on the State to justify Myers' discharge. The District Court viewed the issue of whether Myers' speech was upon a matter of "public concern" as a threshold inquiry, after which it became the government's burden to "clearly demonstrate" that the speech involved "substantially interfered" with official responsibilities....[T]he State's burden in justifying a particular discharge varies depending upon the

First Amendment did not override the deference due to the decision made by Connick and therefore the First Amendment was not violated.

City Administrator MacPherson, Mayor Hardy and Aldermen Roberts and Gentry all testified that they believed Casey was causing, and had caused, disharmony and disruption in the fire department. The City Clerk, Mrs. Billie Stewart, testified that Casey's defamatory lies about her and her son were devastating to her, and had caused her son to quit his position as a volunteer fireman. Instead of following Connick and giving deference to that undisputed testimony, the opinion below, at 12 F.3d p. 803 cites Rankin v. McPherson, 483 U.S. 378, 387 (1987) as holding that the offensiveness of the remarks is irrelevant.[20]

The decision below failed to weigh the essentially personal nature of Casey's

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nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance on the competing interests.

At 461 U.S. p. 151, n. 10, the opinion indicated that it is the court's responsibility to make a de novo review of the record, and the court in view of its constitutional responsibilities "cannot avoid making an independent constitutional judgment on the facts of the case." (Citations omitted) See also Bose Corp. v. Consumers' Union, 466 U.S. 485, 499 (1984), and Waters v. Churchill, ___ U.S. ___, 114 S.Ct. 1878, 1984-85 (1994).

[20] In contrast, a different panel of the Eighth Circuit recently reached the correct result in Shands v. City of Kennett, 993 F.2d 1337, 1345 (8th Cir. 1993), cert. den., 62 U.S.L.W. 3471, finding that the City's decision to discharge was entitled to "judicial deference on two levels": (1) that the speech had caused or would cause disruption, and (2) as to the proper response to the actual or perceived disruption.

motives, the malicious character of his defamatory lies about City Clerk Stewart and her son, or the fact Casey had been essentially removed from his previous position as fire chief because of his disruption and insubordinate "know-it-all" attitude. See Janusaitis 607 F.2d at 16. The fact Casey's statements to MacPherson were viewed as the "last straw" should have been recognized by the court below, as requiring less wrongfulness to justify the discharge.[21]

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[21] The "last straw" doctrine has been recognized for years in employment law. See Giddens v. Appeal Board, 4 Mich.App. 526, 145 N.W.2d 294 (1966); Christopherson v. City of Manominee, 137 Mich.App. 776, 359 N.W.2d 503 (1984); Elkouri, HOW ARBITRATION WORKS (4th Ed. BNA 1985), p. 679, n. 145. It should have been applied here to show the balancing test under Pickering established Defendants were indeed justified in discharging Casey in the circumstances of this case.

See also Waters v. Churchill, 114 S.Ct. 1878, 1889:

> . . . we have consistently given greater deference to government predictions of harm used to justify restrictions of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large. [This was found true even though the perceived dangers were "mostly speculative."] . . . .
> But we have given substantial weight to the government employer's reasonable prediction of disruption, even when the speech involved is on a matter of public concern, and even through when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential. . . . Similarly we have refrained from intervening in government employer decisions that are based on speech that is of entirely private concern. [Even though it is not disruptive and may be of some value] we have declined to question government employers' decisions on such matters. Connick, 461 U.S., at 146-49 . . . .

Casey's disruptiveness over the years was recognized not only by MacPherson, but by his predecessors. Roberts and Gentry had known of this for years. They had allowed Casey to remain as police dispatcher only because Casey promised to keep his nose out of the fire department, and other departments outside his responsibility. Even then he had to be admonished. When his further effort to inject himself into the fire department policy-making was brought to the attention of Mayor Hardy and Aldermen Roberts and Gentry they all agreed this was the last straw - Casey had to go to prevent this type of continuous disruption. This Court should conclude, as did Justice O'Conner in Waters, that such "potential disruptiveness was enough to outweigh whatever First Amendment value the speech might have had." 114 S.Ct. at 1891.

The trial court error was compounded by the Court's refusal to grant the individual aldermen good faith immunity or give their good faith immunity instruction based on Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Malley v. Briggs, 475 U.S. 335 (1986).[22]

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[22] Defendants tendered and the district court rejected Instruction No. CC:

> Your verdict must be for [Petitioners] Gentry and Roberts if you believe:
>
> First, [Petitioners] Gentry and Roberts in voting to terminate [Respondent] reasonably believed they were acting under their authority as Aldermen, and,
>
> Second, [Petitioners] Gentry and Roberts acted in good faith believing they had the right to terminate [Respondent]

The Eighth Circuit's unprecedented narrow view, which will subject local town councils, city aldermen, and other public officials to individual liability despite the "objective legal reasonableness" of their actions, where there is no evidence in their actions or otherwise of malice or anything except good faith, merits review by this Court.

II. The Eighth Circuit Failed To Consider Whether The Speech Should Be Considered As A Whole Or Segmented So Departing From The Example In Connick As To Call For This Court's Exercise Of Jurisdiction; In Addition The Rulings Below Continue An Acknowledged Split Among The Circuits On Whether A Particular Communication Should Be Segmented Or Must Be Considered As A Whole To Be A Matter Of Public Concern, By Failing (a) To Segment The Conversation As Some Specific Statements Were Not Of Public Concern, And (b) To Submit Petitioners' Instructions That Those Statements, Concerning Mayor Hardy, Billie Stewart And Brian Stewart, Were False And Recklessly Made; And This Court Should Take This Case To Resolve That Split.

a. Segmenting the Speech

In Connick v. Myers, 461 U.S. 138 (1983), the employee speech was a single questionnaire sent to other employees. The Supreme Court did not consider the questionnaire as a unit, instead, the Court found that one of the questions on the questionnaire was on a matter of public

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under the circumstances.

concern, while the remainder were only personal in nature.[23]

The Eighth Circuit below cited Shands, 993 F.2d at 1342, for the proposition that "any underlying factual disputes concerning whether the speech at issue was protected should have been submitted to the jury." (Panel Op. p. 6) But that was not done in the instant case. In Shands v. City of Kennett, 993 F.2d 1337 (8th Cir. 1993), the Eighth Circuit did sort out matters of primarily personal concern from matters of public concern. This Court should grant certiorari in this case, to resolve the important issues, and internal inconsistencies in those recent Eighth Circuit opinions.

There is also an acknowledged split among the United States Courts of Appeal. In

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[23] Although Connick did segment the statements, the Court did not hold that a single writing or conversation had to be segmented or considered as a whole and a split in the circuits has developed. See infra.

In Postal Worker v. Postal Service, 820 F.2d 294 (D.C. Cir. 1987), the court discussed the tension, between the mandate of Rankin v. McPherson that courts must consider speech in the context made, with the example set in Connick that courts should separate out various components of the speech. The Court presented a common sense view that an unjustified attack in the middle of a speech to inject a matter of public concern does not by the magic of "context" become protected. See also, Arnett v. Kennedy, 416 U.S. 134 (1974).

In the instant case the trial Court's failure to rule on whether the conversation would be segmented or treated as a whole until the end of the trial, at which time the Court reversed the earlier decision of Judge Clark that the statement about Mayor Hardy was not protected (See App. 134), by holding all the speech was protected, further prejudiced Defendants and denied them due process. Bryson v. Waycross, 888 F.2d 1563 (11th Cir. 1989); Wood v. Frederica, 529 F.Supp. 403 (D. Del. 1982).

Saulpaugh v. Monroe Community Hospital, 4 F.3d 134, 147 (2d Cir. 1993) Chief Judge Newman, concurring, pointed out the Fifth and Seventh Circuits have taken contrary views on whether the entire speech must be placed in either the "public concern" or "private interest" category or whether it may be segmented.[24] Judge Newman said the Fifth Circuit is correct although his (Second) Circuit agreed with the Seventh Circuit that the speech cannot be segmented. While the Eighth Circuit opinion in Casey appears to side with the Second and Seventh Circuits, the opinion in Shands seems to side with the Fifth Circuit. Certiorari should be granted in this case, to resolve the conflict among the Circuit Courts and clarify the analysis to be made in cases like these.

b. Petitioners' Instructions.

The Trial Court below refused to submit Petitioners' instructions and theory of the case to the jury (See App. 184-88), that Casey acted recklessly[25] in making the false

---

[24] The Seventh Circuit has now apparently distinguished between public interest and public concern in holding that just because the entire speech is deemed to be of public import or interest, it is not necessarily protected. See Smith v. Fruin, No. 93-2839 (7th Cir. 6/30/94).

[25] Mr. Susman specifically called the question of recklessness to the Court's attention and had the Court rule the matter, although it should have been left to the jury.

"Mr. Susman: Is there also incorporated in the Court's comments just finished, that the statements were not recklessly made?"

"The Court: That's -- yes. That's implicit in the holding, and in the refusal of the instructions that were given in that regard."

(T.V. 5, p. 3)

statements concerning Mayor Hardy, and the Stewarts. See Wilson v. UT Health Center, 973 F.2d 1263, 1270 (5th Cir. 1992).

The court below held Petitioners' instructions were "prolix, confused, and in part clearly inappropriate." 12 F.3d at 803-04. But Petitioners' instructions, based on textbooks, cases, and model instructions, presented Petitioners' version of the disputed factual statements and should have been given under Shands:

INSTRUCTION NO. FF

Your verdict must be for [Petitioners] if you believe [Petitioners] would have discharged [Respondent], in the absence of his protected speech, based on his personnel file, past history and the recklessly false statement that City Clerk Billie Stewart was guilty of misappropriating.

(Instructions GG and HH were identical to FF, except that the last phrase of GG read "that Brian Stewart reported to duty as a volunteer fireman intoxicated.", and the last phrase of HH read "that Mayor Ed Hardy lied to [Respondent] about not reappointing Billie Stewart.")

III. The Decision Below So Far Departs From This Court's Holding In University of Tennessee v. Elliott, As To Require This Court's Supervisory Intervention In That Respondent's Free Speech Claims Were Presented And Found To Be Without Merit, In Respondent's Post-Termination Hearing, Which Casey Failed To Appeal; Thus The Court Should Have Dismissed This Suit For Failure To Exhaust State Remedies And On Grounds Of Res Judicata, Claim Preclusion, Or Estoppel.

Respondent was given a post-termination hearing and a written decision was issued. (Def. Tr. Ex. 13; App. 107-08) Under Missouri law, the City of Cabool is an administrative agency. (See Chapter 536 RSMo.) The post-termination appeal hearing conducted June 9, 1992, was a "contested case" and the findings and conclusions from that hearing, not having been timely appealed have become final and cannot be collaterally attacked in this separate action.[26]

An administrative decision of an adjudicatory character binds the parties to the proceeding, Columbia Broadcasting Sys., Inc. v. United States, 316 U.S. 407 (1942); and is res judicata, thereby precluding a subsequent judicial proceeding between the same parties regarding the matters litigated. Terminal Warehouse Co. v. Pennsylvania R. Co., 297 U.S. 500 (1936). See also United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966).

This Court recently advocated such administrative procedures that would avoid turning controversies like the instant one into Federal lawsuits. See Waters v. Churchill, 114 S.Ct. 1878 (1994). Missouri and Cabool have such a mechanism which was employed here, at least through the administrative phase when Casey failed to seek review under State statutory procedures.

Casey's post-termination hearing decision was subject to judicial review under Chapter 536 of the Missouri Revised Statutes. (See T.V. 4 p. 144) Judicial review was not sought in the Missouri State courts, rather the instant suit was brought in federal court,

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[26] See cases cited at note 11, supra.

alleging the termination was for protected free speech. (App. 5-8)

An individual who has an available state administrative or judicial procedure to vindicate their rights and who exercised that procedure, whether or not it is pursued on appeal, is, where there is a hearing and a record made, foreclosed from raising the claims again in a separate federal court proceeding under 42 U.S.C. § 1983. See University of Tennessee v. Elliott, 478 U.S. 788 (1986); Butler v. North Little Rock, 980 F.2d 501 (8th Cir. 1992); Yancy v. McDevitt, 802 F.2d 1025 (8th Cir. 1986). But see Edmundson v. Borough of Flannett Square, 4 F.3d 186, 193 (3d Cir. 1993) (suggesting the circuits may be a split on what preclusive effect is to be given judicially unreviewed agency rulings under Elliott).

The issue of whether Respondent was terminated for exercising his right of free speech was relevant, necessary, and essential to determine the matter. (See discussion of hearing pp. 10-12, supra)

Although raised in the Trial Court and briefed and argued on appeal, the Eighth Circuit failed to address the issue of whether the District Court should have dismissed the suit for failure to exhaust state remedies and/or under the related doctrines of res judicata, claim preclusion, or estoppel.

IV. The Trial And Appellate Court Rulings Below Conflicted With Farrar v. Hobby In Awarding Respondent's Over $80,000.00 In Attorneys' Fees For The Reasons That:

1. The Award Was Disproportionate To The Claims Made Of $200,000.00 And Jury Award Of $18,888.00 And Failed To Account For The Amount Of Success.

The District Court failed to account for the Respondent's degree of success in awarding Respondent's attorney fees, the most important factor to be considered, according to Justice Thomas in Farrar v. Hobby, 121 L. Ed.2d 494, 505-06:

> Indeed, "the most critical factor" in determining the reasonableness of a fee award "is the degree of success obtained." [I]f "a Respondent has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." Yet the District Court calculated petitioners' fee award in precisely this fashion without engaging in any measured exercise of discretion. "Where recovery of private damages is the purpose of...civil rights litigation a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." Such a comparison promotes the court's "central" responsibility to "make the assessment of what is a reasonable fee under the circumstances of the cases." (citations omitted)[27]

Where recovery is but a small fraction of the damages sought attorneys' fees should be adjusted accordingly.

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[27] See, e.g., Willis v. City of Chicago, 999 F.2d 284 (7th Cir. 1993); Cullens v. Georgia Dept. of Transp., 827 F.Supp. 756, 762-64 (M.D.Ga. 1993).

Casey's Complaint sought $200,000.00 (App. 5-8), and at the trial Casey asked the jury for $67,000.00 (T.V. 5 p. 25) (30 months back pay and 12 months front pay at $12,000.00 annually, plus $247.00 medical insurance and 13% retirement). (T.V. 1 p. 111) The jury awarded him $18,888.00 (App. 189), and the Trial Court awarded Respondent $68,035.39 in attorneys' fees. (App. 352-57)

Respondent has taken the position he only asked the jury for $67,000.00. But the fee award included time for opposing Petitioners' Summary Judgment Motion and drafting motions to compel discovery, and opposing Petitioners' Motion for a protective order regarding punitive damages. The trial Court struck the $100,000.00 punitive damage claim. (App. 138; Add. 17)[28]

As a sub-issue, the Eighth Circuit held Petitioners failed to meet their burden of showing the fee award was excessive. Petitioners specifically requested an evidentiary hearing to examine the basis of Respondent's fee request and show the request was excessive, but the District Court denied that hearing. (App. 229-30, 238-40) See Goldberg v. Kelly, 397 U.S. 254 (1970). (App. 229-30, 238-40); Sargeant v. Sharp, 579 F.2d 645 (1st Cir. 1978).[29]

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[28] Time devoted to issues on which Respondent did not prevail should be excluded in calculating attorney fees. Scheeler v. Crane Co., 21 F.3d 791 (8th Cir. 1994); Marion v. Barrier, 694 F.2d 229 (11th Cir. 1982).

[29] From the beginning of her representation of Mr. Casey in 1990, and for all the time she has already been paid by Mr. Casey, Ms. Hedrick's hourly rate was $65.00 per hour -- yet for the fee rate she sought and was awarded by the Trial Court from Petitioners she billed her time at $80.00 to $100.00 per hour, with no showing that Casey ever

2. The Attorneys' Fees Awarded Were Excessive.

In Petitioners' opposition to Respondent's Request for Costs and Attorneys' Fees (App. 238-311), Petitioners pointed out the basis for denying or reducing Respondent's requested attorney fees and costs in great detail, identifying on Respondent's billing summary the charges that should have been eliminated. (See App. 264-93)[30]

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agreed to any increase. Petitioners should have been allowed to explore the basis for the hourly fee rates requested.

[30] Because of space limitations those arguments are only outlined here. Specifically, the Trial Court erred in (a) allowing Plaintiff's attorneys a fee award for time spent on issues on which they did not prevail (App. 247-50); Hensley v. Eckerhart, 461 U.S. 424 (1983); (b) allowing travel time of approximately $3,600.00 to the St. Louis attorneys for driving round trip from St. Louis to Springfield (App. 246); Central Delaware Branch of NAACP v. Dover, 123 F.R.D. 85 (D. Del. 1988); (c) including lawyer time for tasks that should have been handled by paralegals such as summarizing depositions and filing papers (App. 254-55); Teleson v. Life & Health Ins. Co., 643 F.Supp. 779 (E.D. Pa. 1986); (d) allowing recovery for time for three trial attorneys when Plaintiff put only one witness and all the examination and argument was handled by one attorney (App. 250-52); Hart v. Walker, 720 F.2d 1436, 1442 (5th Cir. 1983); and (e) allowing an inappropriate hourly rate because of the erroneous finding that Plaintiff exhausted efforts to find local counsel, and the fact the only fee agreement between Plaintiff and any of his attorneys was at a rate approximately 1/2 to 2/3 the hourly rates awarded. (App. 255-59) See Ramos v. Lamm, 713 F.2d 546, 565 (10th Cir. 1983).

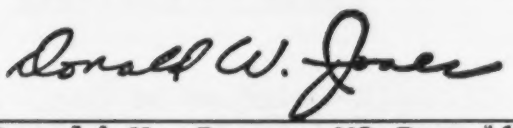
The Courts below also should have, but did not, consider the limited resources of the City (App. 255-63, 294-300); Bond v. Keck, 629 F.Supp. 225, 228 (E.D.Mo. 1986), and punitive nature of the attorney fee award here. See Chastang v. Flynn & Emrich Co., 541 F.2d 1040, 1047 (4th Cir. 1976).

CONCLUSION

For all the above reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HULSTON, JONES, GAMMON & MARSH

By: 

Donald W. Jones, MO Bar #18744
Counsel of Record
Timothy E. Gammon, MO Bar#23345
2060 East Sunshine
Springfield, MO 65804
(417) 887-1858

ATTORNEYS FOR PETITIONERS

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1262

John C. Casey,	*	
	*	
Appellee,	*	
	*	
v.	*	
	*	
City of Cabool, Missouri, Jay Gentry, Individually and in the official Capacity as Alderperson of the City of Cabool, Missouri; Jerry D. Roberts, Individually and in the official capacity as Alderperson of the City of Cabool, Missouri,	*	Appeal from the United States District Court for the Western District of Missouri
	*	
Appellants.	*	

Submitted: September 15, 1993
Filed: December 28, 1993

Before McMILLIAN, Circuit Judge,
HENLEY, Senior Circuit Judge,
and MORRIS SHEPPARD ARNOLD, Circuit Judge.

MORRIS SHEPPARD ARNOLD, Circuit Judge

The City of Cabool, Missouri ("the City") and two city council members appeal a

district court judgment and award of attorney's fees in favor of John C. Casey, a former employee who brought this action under 42 U.S.C. § 1983 after he was discharged. At issue is whether a municipal government may be held liable for discharging an employee for making private statements critical of city officials and policies. We hold that it may and therefore affirm.

I.

John Casey was employed by the City as a police and fire dispatcher beginning in 1981. He also held the position of fire chief for the City before resigning from that post in September of 1983. The reason for his resignation at that time, and the apparent catalyst for the present dispute, was Casey's deeply held and frequently expressed opinions on City fire department policies.

On May 3, 1990, Casey went to the office of City Administrator Michael MacPherson prior to beginning his work shift. While in MacPherson's office, Casey expressed his disapproval of certain fire department policies. When the work whistle blew at 5 o'clock, Casey reported to work at the police department across the street. A few minutes later MacPherson followed, and the conversation regarding fire department policies continued in Casey's office. At that point Casey suggested that the Missouri state auditor might be contacted about these issues, and that such scrutiny might mean trouble for the city clerk and the mayor. Casey elaborated by asserting that the clerk had employed city resources to effect repairs at her home, and that when he informed the mayor he was told that the clerk was retiring

soon. Casey then told MacPherson that when the mayor was reelected he reappointed the clerk, evidently suggesting that the mayor had done something he previously indicated he would not do. Casey also apparently alleged that the clerk's son had once shown up intoxicated for duty as a volunteer fire fighter. The City produced evidence that Lynn Jones, Casey's supervisor, walked in and overheard some of the conversation.

MacPherson related the conversation to the mayor and the city clerk, and a few days later, to an executive session of the city council. MacPherson stated that Casey had no right to question city council policy, and that to do so was unacceptable, insubordinate, and disloyal. As a result, the council voted two to one to terminate Casey's employment with the City.

Casey brought this action under 42 U.S.C. § 1983, alleging that he had been discharged from public employment in violation of his right to free speech. The district court entered judgment upon a jury verdict of $18,888, and awarded plaintiff attorney's fees of $65,987 and expenses of $3,294.89. The City now appeals both the judgment and the fee award.

II.

It was once the law that:

> [w]ords spoken in derogation of a . . . great officer of the realm, which are called ***scandalum magnatum***, are held to be . . . heinous; and, . . . when spoken in disgrace of such high and respectable characters, they amount to an atrocious

> injury: which is redressed . . . on behalf of the crown, to inflict the punishment of imprisonment on the slanderer. . .

3 William Blackstone, Commentaries on the Laws of England 123-124 (1768). A revolution intervened, however, so that today "[i]t is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." Rankin v. McPherson, 483 U.S. 378, 383 (1987). This does not imply that public employees are free to say anything they wish. Only constitutionally protected speech serves as an impermissible basis for discharge of a public employee.

Even where constitutionally protected speech is involved, public employees are not free simply to speak their minds. The determination of whether a discharge for free speech was proper requires "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Education, 391 U.S. 563, 568 (1968). The question of whether Casey's discharge was permissible, then requires (1) an inquiry into whether his speech is constitutionally protected, and (2) a balancing of his interest in free speech against the City's interest in efficient administration.

A.

The threshold question is therefore whether Casey's speech can be "fairly

characterized as constituting speech on a matter of public concern." Connick v. Myers, 461 U.S. 138, 146 (1983). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Id. at 147-148. Because Casey's speech amounted to straightforward criticism of government officials and policy, we hold that it falls squarely within the meaning of "speech on a matter of public concern."

Criticism, no matter how obnoxious or offensive, of government officials and their policies clearly addresses matters of public concern. See Rankin v. McPherson, 483 U.S. 378 (1987). In Rankin, a clerical worker in a law enforcement agency was held to have spoken on a matter of public concern when, after hearing of an attempt on the life of the president, she said, "If they go for him again, I hope they get him." Id. at 380. The court reasoned that the statement, made within the context of criticism of the president's policies, was clearly an expression of displeasure with those policies.

Similarly, when Casey's statements are considered in context, as Connick requires, it becomes apparent that they dealt with matters of public concern. They were made in the context of a discussion of City policy and the actions of City officials. Few topics are of greater public concern.

The City argues that, since Casey's underlying concern was the effect that City fire policy would have on his own pocketbook, his statements were really of private, and

not public, concern. This reasoning is unpersuasive. A taxpayer's concerns that a city policy might raise his insurance premiums is a concern about a public policy, the effects of which are ultimately always private.

While MacPherson, the mayor, the city clerk, and the majority of the Cabool city council may have taken great offense upon hearing Casey's statements, we emphasize that offensiveness is irrelevant to the issue of whether a matter is of public concern. See Rankin, 483 U.S. at 387. Nothing that Casey is alleged to have said could be more disturbing than an expressed desire by a law enforcement employee to see criminal violence inflicted on the president. Since in the present context, the content, and not the outrageousness of the statement, is the material matter, we find that Casey's speech was on a matter of public concern.

B.

Our analysis next requires a balancing of Casey's interest in making the statement against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568. Even if Casey's statements were on a matter of public concern, they may still serve as permissible grounds for discharge if the City can show that the statements interfere with a legitimate governmental interest in the operational efficiency of the enterprise. See Rankin, 483 U.S. at 388. "The State bears a burden of justifying the discharge on legitimate grounds." Rankin, 483 U.S. at 388.

When balancing the free speech and administrative interests, "the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." Rankin, 483 U.S. at 388. The effects on discipline, harmony among coworkers, working relationships requiring loyalty and confidence, the performance of the speaker's duties, or the regularity of the operation of the enterprise are all relevant considerations. Id.

We begin our review of the application of the Pickering principles to this case with the observation that any underlying factual disputes concerning whether the speech at issue was protected should have been submitted to the jury. See Shands v. City of Kennett, 993 F.2d 1337, 1342 (8th Cir. 1993). The trial court did not do that, ruling, in effect, that there were no relevant factual disputes of a submissible character. Although defendants submitted instructions submitting some factual matters to the jury, those instructions were prolix, confused, and in part clearly inappropriate. The trial court thus properly rejected them, even if there were unresolved factual disputes that deserved submission.

In any case, we believe that the trial court acted properly in ruling on the question of whether the speech in question was protected. Casey's interest in making the statements was substantial. Indeed, a citizen's right to be critical of government and government officials lies at the core of the principle of free speech. We also observe that the only legitimate governmental interest in preventing or punishing employee speech is to promote or maintain "the

effective functioning of the public employer's enterprise." Rankin, 483 U.S. at 388. It is not permissible to use the power of government office for the private purpose of protecting those who hold government office.

Second, the City's interest in effective, efficient government was unaffected by Casey's statements. Casey's speech had no impact on his ability to perform his duties as a dispatcher. Although a portion of the conversation is alleged to have been overheard, no working relationships were placed in jeopardy, since Casey did not work in close contact with anyone discussed. No effect could be had on the operations or effectiveness of City government, unless the City operated in a way that might not survive scrutiny. Finally, nothing in the statements made renders Casey unsuitable for state employment. There was no disclosure of dishonesty or illegality on Casey's part. In sum, it is difficult to see how Casey's discharge furthered any legitimate interest at all.

The City, relying on Smith v. Cleburne County Hospital, 870 F.2d 1375 (8th Cir. 1989), argues that the district court erred in failing to distinguish certain of Casey's various statements as unprotected speech for which the discharge might have been proper. In Cleburne County Hospital, a hospital denied staff privileges to a doctor after he engaged in a protracted public debate with administrators over hospital policies. This court determined that, while much of the doctor's initial speech was protected, the "caustic personal attacks" on hospital administrators made in subsequent letters to

patients were not on a matter of public concern. Id. at 1382.

The City's reliance on Cleburne County Hospital is misplaced. That case was simply an application of the Pickering balancing analysis, not an exception to it. The doctor in that case was denied staff privileges, not because of personal attacks on administrators, but because his expressive activity caused "disruption, disharmony, dissention, and create[d] an adverse economic effect on the public service the institution performs." 870 F.2d at 1383. Through these adverse effects, the hospital in Cleburne was able to demonstrate a legitimate basis for the denial of staff privileges. In short, the "interest of the State, as an employer, in promoting the efficiency of the public services it performs" outweighed the doctor's interest as a citizen in free speech. Pickering, 391 U.S. at 568. In the present case, the City failed to demonstrate that Casey's statements had any effect whatsoever on the efficiency or effectiveness of City government.

III.

Defendant city council members Gentry and Roberts assert that they were entitled to qualified immunity from suit in this case. It is true that officials engaged in executive functions, such as the termination decision in this case, have sometimes successfully advanced a qualified immunity defense. See e.g., Hafer v. Melo, 112 S.Ct. 358, 364 (1991). This immunity, however, is available only if defendant's "conduct does not violate clearly established statutory or constitutional rights of which a reasonable

person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). No right is more clearly established in our republic than freedom of speech. It is also "clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." Rankin, 483 U.S. at 383. Since the rights infringed in this case were clearly established, the judgment of the district court with respect to defendants Gentry and Roberts was proper.

IV.

We turn next to the issue of the award of attorney's fees.

Fee shifting in § 1983 cases is governed by statute. The relevant portion of 42 U.S.C. § 1988 reads:

> In any action or proceeding to enforce a provision of section[] . . .1983, . . . the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

A.

The initial question regarding the propriety of awarding attorney's fees in a civil rights case is whether the party requesting fees can be characterized as a prevailing party. A prevailing party is one that obtains "at least some relief on the merits of his claim." Farrar v. Hobby, 506 U.S. ____, ____, 113 S.Ct. 566, 573 (1992). Any relief, even nominal damages, satisfies

the requirement for prevailing party status. Id. "[T]he prevailing party inquiry does not turn on the magnitude of the relief obtained." By this standard, the damage award of $18,888 clearly makes Casey a prevailing party under the statute.

B.

We turn now to the amount of the fee award. "The district court's determination respecting fees is reversible only if the court abused its discretion." Hendrickson v. Branstad, 934 F.2d 158, 162 (8th Cir. 1991). "The lodestar award (the product of reasonable hours multiplied by a reasonable rate) is presumptively a reasonable fee, and most factors relevant to determining the amount of a fee are subsumed within the loadstar." Id. Accordingly, if the district court awarded the loadstar amount, peculiarities must be present to overcome the presumption that the district court did not abuse its discretion.

To evaluate fairly the district court's exercise of discretion in this case, it is necessary to review the purpose of the statutory provision applied. Congress intended that "[i]n computing the fee, counsel for prevailing parties should be paid, as is traditional for attorneys compensated by a fee-paying client, `for all time reasonably expended on a matter.'" S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908. The primary purpose of this formulation is to promote diffuse private enforcement of civil rights law by allowing the citizenry to monitor its violations at their source, while imposing the costs of rights violations on

the violators. See Id. A plaintiff bringing a civil rights action "does so not for himself alone but also as a `private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest . . ." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

In order for such a policy to be effective, Congress felt it appropriate to shift the true full cost of enforcement to the guilty parties to eliminate any obstacle to enforcement. "It is intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases. . ." S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908.

Fee awards must be structured so that attorneys of quality and experience with other profitable demands upon their time will not need to sacrifice income available in alternative enterprises in order to effect a public policy intended to protect all citizens. In other words, "the market rate of legal time is the opportunity cost of that time, the income foregone by representing this plaintiff." Gusman v. Unisys Corp., 986 F.2d 1146, 1149 (7th Cir. 1993) (quoting Barrow v. Falck, 977 F.2d 1100, 1105 (7th Cir. 1992)). Any other rule would relegate civil rights enforcement (and the law that results) to those lawyers with below-market billing rates. The rates for these lawyers are usually below market for a reason. A

refusal to pay for experience and expertise will exact a cost in the form of inexperience and, perhaps, incompetence.

While the opportunity cost of the lawyer's time provides the starting point for determining a presumptively correct hourly rate, it is not the end of the inquiry. Other considerations, including the complexity of the litigation and the relevant market for legal services from which the plaintiff had to choose are also of relevance. The City does not claim that the issues in this case were so simple that the most junior of attorneys could have handled it. The City could not continue to contend that they have no liability here at all, with one breath, and then assert that this case was a "pushover" for plaintiff with the next.

Another consideration in determining the reasonableness of the fee is the relevant market involved. The relevant market for attorneys in a matter such as this may extend beyond the local geographic community. "A national market or a market for a particular legal specialization may provide the appropriate market." Hendrickson v. Branstad, 740 F. Supp. 636, 642 (N.D. Iowa 1990) (reversed in part on grounds not relevant here, Hendrickson v. Branstad, 934 F.2d 158 (8th Cir. 1991)). To limit rates to those prevailing in a local community might have the effect of limiting civil rights enforcement to those communities where the rates are sufficient to attract experienced counsel. Civil rights would be more meaningful, then, in those communities (large cities) where experienced attorneys can command their customary fees. This result would be in direct contravention of the

purpose of diffuse enforcement through the "private attorneys general" concept.

C.

With these considerations in mind, we look now to the award of fees in this case. The district court awarded the lodestar in this case, and in fact reduced it to account for some of the considerations mentioned above. The court found $150.00 per hour and $120.00 per hour for the two plaintiff's attorneys, respectively, to be a reasonable rate for their services in this case, and allocated significantly smaller amounts for the work of their staff. These rates were chosen despite the fact that Mr. Susman, the lead attorney in this case, requested a rate equivalent to his customary billing rate of $185.00 per hour.

The City contends that some of the time compensated was spent in pursuit of theories and on issues upon which Casey did not prevail. This argument ignores the precedents on this issue and their rationale. Once a party is found to have prevailed, "[a] fee award should not be reduced merely because a party did not prevail on every theory raised in the lawsuit." Hendrickson, 934 F.2d at 164. In Hendrickson, this court found that a fee awarded under § 1988 properly compensated plaintiff's attorney for time spent on interrelated issues and theories upon which the plaintiff did not prevail. Id. We reasoned that counsel's time is devoted to the case as a whole, rather than to specific theories. The dispositive consideration, therefore, is whether the issues upon which plaintiff's counsel spent time are interrelated to the central issues of the

case. The defendants, however, point to five issues upon which the plaintiff did not prevail, without addressing whether these or other issues might be unrelated to the central issues of the case. Since defendants did not raise the issue of interrelatedness below, and do not raise it here, we are precluded from addressing that question.

We find that the reasons given by the district court support the fees assessed, and find no basis upon which to find that the court abused its discretion. It is the defendants' burden to show that this discretion was abused, and in this effort they have failed. The district court's award of attorney's fees is consistent with the policy that Congress articulated when it enacted the fee shifting provision of § 1988, and, therefore, is affirmed.

V.

We conclude that the City violated Casey's right to free speech. Since this right is protected from government actions like those at issue here, the defendants are liable for the misuse of public authority. The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

June 8, 1990

Mayor & Board of Aldermen
City of Cabool
Cabool, Missouri 65689

Re: John Casey Appeal Hearing

STATEMENT OF FACTS, FINDINGS,
AND RECOMMENDATIONS

On June 7, 1990, beginning at 3:00 p.m. a hearing was held before me, Don Wells, in the Council Chambers of the City of Cabool at the request of John Casey and his Attorney, Peggy Hedrick.

Attorney Peggy Hedrick called the following persons to testify: Cabool Policy [sic] Chief, Lynn Jones, Cabool Aldermen [sic], Chris Purvis, Cabool City Administrator, Michael MacPherson and John Casey. The City of Cabool did not offer any testimony or witnesses, but was represented by John Alpers, Jr., City Attorney.

FINDINGS OF FACT:

John Casey had been employed by the City of Cabool from 1982 until May 8, 1990, last serving as a Police Dispatcher. On May 7, 1990, the Cabool Board of Aldermen terminated his employment and Mr. Casey was so notified the following day, May 8, 1990, that he was terminated immediately. Thereafter, John Casey filed an appeal resulting in this hearing.

That throughout his employment, John Casey had been reprimanded from time to time for not following instructions and causing descension [sic] among his fellow employees. That he had been previously warned not to interfer [sic] in the work and duties of other employees and other departments.

On May 3, 1990, John Casey approached City Administrator, Michael MacPherson with the following allegations:

1. That Cabool City Clerk, Billie Stewart, had misappropriated City funds and that he was going to request an audit of the City funds by State Auditor, Margaret Kelly through an initiative petition.

2. That Mayor, Ed Hardy had confided in him earlier that the Mayor was going to fire the City Clerk after he was elected.

3. That he had difficulty with the City Clerk after her son, Brian Stewart appeared at a fire in an intoxicated condition.

4. That it is illegal for the City of Cabool to charge people outside the City limits for fire calls made, and that he would also be reporting this to the State Auditor to conduct an audit concerning that matter.

5. He demanded that the lead fire equipment be sent to rural fires, contrary to the instructions of the Mayor and Board of Aldermen.

6. That John Casey generally accused the Board of Aldermen and Mayor of not telling the truth, and acting improperly in various situations.

FINDINGS:

That during the entire employment of John Casey by the City of Cabool, he has been warned and counseled on numerous occasions for failing to follow orders, interferring [sic] in the work of the City and fellow employees and stirring discontent among employees. That the statements John Casey made to Michael MacPherson on May 3, 1990, amounted to serious insubordination making his further employment with the City of Cabool intolerable. That his improper conduct continued after numerous warnings, including the threat of termination of employment and his continued disregard of City policy and instructions is contrary to the best interest of the City of Cabool, its Administration and employees.

RECOMMENDATION:

I recommend that John Casey's termination of employment effective May 4, 1990, be affirmed and that John Casey's request for reinstatement be denied.

_____

Don Wells Mayor Protem
City of Cabool, Missouri

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

JUDGMENT IN A CIVIL CASE

JOHN C. CASEY	)	
	)	
	)	
vs.	)	Case No. 91-3173-CV-S-E
	)	
	)	
CITY OF CABOOL, et al.	)	

xx **Jury Verdict.** This action before the Court for a trial The issues have been tried and the jury has rendered its verdict.

__ **Decision by the Court.** This action came to trial/hearing/a determination before the Court. The issues have been tried/heard/determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that on the claim of plaintiff John C. Casey against defendants, City of Cabool, Jay Gentry, and Jerry D. Roberts, judgment is entered in favor of plaintiff and against defendants in the amount of $18,888.00.

November 20, 1992
Date

R. F. Connor
Clerk

Entered on: November 20, 1992

/S/
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

JUDGMENT IN A CIVIL CASE

JOHN C. CASEY)
)
)
vs.) Case No. 91-3173-CV-S-E
)
)
CITY OF CABOOL, et al.)
)

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xx **Decision by Court.** This action came to a determination before the Court. The issues have been determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motion for judgment as a matter of law, or in the alternative, for a new trial be, and is hereby, denied. It is further

ORDERED that defendants' motion to amend the judgment and to reduce it by one-half, or at least by $4,000 be, and is hereby, denied. It is further

ORDERED plaintiff's motion for contempt be, and is hereby denied. It is further

ORDERED that plaintiff's motion for attorneys' fees and expenses be and is hereby granted in part. Total attorneys' fees in the amount of $65,987.50 will be, and are hereby awarded, for a total of $68,035.39

January 19, 1993 — R. F. CONNOR
Date — Clerk

Entered on: January 19, 1993 /S/
(By)Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

JOHN C. CASEY,	)	**"FILED" STAMPED 01/19/93**
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 91-3173-CV-S-E
CITY OF CABOOL, MISSOURI, et al.	)	
	)	
Defendants.	)	

ORDER

Pending before the Court in the above-styled case are defendants' motion for judgment as a matter of law, or in the alternative, for a new trial, defendants' motion to amend the judgment, plaintiff's motion requesting that defense counsel Donald W. Jones be held in contempt of court, and plaintiff's motion for attorneys' fees and costs.[1]

I. DEFENDANTS' MOTIONS

Defendants have asked the Court to set aside the verdict and judgment entered for plaintiff, and enter a judgment as a matter of law for defendants, or alternatively,

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[1] Although defendants have continued to assert the need for an evidentiary hearing on the issue of attorneys' fees, the Court does not consider a hearing to be necessary in this case.

order a new trial on the issue of liability. Defendants have also filed a motion to amend the judgment to reduce the same by one-half, or at least by $4,000.

Defendants ask that judgment be entered for them because of the following: 1) that defendants Roberts and Gentry had either absolute or qualified immunity from liability and that the Court erred in refusing to submit the issue of qualified immunity to the jury; 2) that the Court erred in holding that all of the speech was protected, and in not allowing the jury to decide if unprotected speech was the basis of plaintiff's termination; 3) that the Court failed to properly instruct the jury that any sum awarded to plaintiff as back pay should be reduced by any sums that plaintiff earned or with reasonable diligence could have earned; 4) that it was error to sustain defendants' first summary judgmeny motion and to fail to act on defendants' second motion for summary judgment; 5) that plaintiff failed to mitigate his damages; 6) that defendants were prejudiced by the Court's error in not asking certain questions tendered by defendants during voir dire; 7) that the Court erred in not submitting to the jury the issue of whether plaintiff's statements about Billie Stewart, Brian Stewart and Mayor Hardy were recklessly or maliciously made; 8) that plaintiff failed to exhaust administrative remedies, and that he is therefore barred by the principles of res judicata from bringing the instant action; and 9) that the judgment was excessive and should be reduced by one-half, or at least by $4,000.00, the amount of unemployment compensation received by plaintiff.

Defendants' contend, in the alternative motion for a new trial on the liability issue alone, that: 1) they were denied due process because the Court did not make the protected speech ruling prior to the impanelling of the jury and defendants made their opening statement and presented evidence to the jury for three or four days without benefit of this ruling; 2) the Court improperly overruled and sustained various objections made during trial, thereby materially prejudicing defendants; 3) the Court improperly overruled the mistrial motions made by defendants[2]; 4) they were denied a fair trial because of improper remarks made and actions taken by plaintiff's counsel, specifically remarks regarding an agreement by the city of Cabool to indemnify defendants Roberts and Gentry and whether plaintiff had to hire a lawyer and pay fees in this case, and actions by counsel that made plaintiff's wife more conspicuous; 5) prejudicial error occurred when plaintiff's counsel was allowed to argue in closing statements that the May 7 meeting was caused by the plaintiff's free speech statements, in opposition to the Court's instruction that this was not an issue; 6) the Court improperly admitted certain exhibits offered by plaintiff and improperly excluded defendants' exhibits; 7) the Court refused offers of proof made by defendants[3]; 8) the Court erred in tendering plaintiff's verdict director to the jury, and in improperly ruling that all of plaintiff's

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[2] Although defendants actually used the word "plaintiff," the Court believes that they meant to use the word "defendants" and has substituted accordingly.

[3] See Footnote Number 1.

statements were protected speech; 9) the Court erred in tendering Instruction Numbers 8, 11 and 12 to the jury, and in refusing Instructions Numbers AA, BB, CC, DD, EE, FF, GG, and HH; and 10) the Court improperly allowed plaintiff to amend the complaint to allege front pay and refused to allow a postponement for additional discovery.

The Court turns first to defendants' assertion that the judgment was excessive. Defendants' contentions that the award should be reduced by one-half, or at least by $4,000.00, are without merit. There is no basis by which the Court can determine how much of the verdict represented back pay, if any, and how much represented front pay, and accordingly, it would be improper to reduce the judgment by the amount of unemployment compensation plaintiff received. Additionally, as noted by plaintiff, defendants did not submit an instruction regarding a reduction for unemployment compensation, and have therefore waived any error in this regard. Having fully reviewed the record, the Court finds that the verdict is in accordance with the weight of the evidence and is, therefore, not excessive.

Next at issue are defendants' various assertions regarding jury instructions. Defendants contend that the Court erred in: not instructing regarding reduction of back pay; not submitting an instruction regarding plaintiff's statements being malicious; tendering plaintiff's verdict director; and tendering various instructions and refusing others. Having carefully scrutinized the record, it is clear that the Court's rulings regarding the jury instructions were proper,

and that there was no error in the instructions as submitted by the Court.

Regarding the Court's refusal to ask voir dire questions to the jury tendered by defendants, specifically whether jurors would be prejudiced by the fact that plaintiff's wife was in a wheelchair, and whether jurors had participated with or been members of the American Civil Liberties Union, those questions were irrelevant, immaterial and not appropriate to tender.

Defendants contend that the Court improperly ruled on the protected speech issue. The Court ruled on that issue after hearing evidence in the case in order to make the ruling with full knowledge of the statements made and the context in which they were made. Defendants have failed to establish that they were prejudiced by the timing of the ruling, and accordingly, there was no error in this regard.

Defendants also assert that the Court erred in not allowing the jury to decide the issue of qualified immunity and whether unprotected speech was the basis of plaintiff's termination. Because those are questions of law that must be decided by the Court, it is obvious that there was no error.

The Court agrees with plaintiff that he was not required to prove that he had mitigated his damages. Because failure to mitigate damages was plead as an affirmative defense, defendants had the burden of proof on that issue, and accordingly, their contentions are without merit.

Defendants also continue to complain about the Court's rulings on the issue of res judicata and on the summary judgment motions. They have made no new arguments on these issues, and the Court is of the opinion that rulings were properly made, warranting neither a new trial nor judgment as a matter of law.

Actions of plaintiff's counsel have also been raised as grounds for a new trial. Defendants contend that plaintiff's counsel made improper remarks regarding whether defendants Roberts and Gentry would have to personally pay any judgment and whether plaintiff had to hire an attorney, acted in a manner to make plaintiff's wife more conspicuous, and improperly argued during closing argument. The Court finds these contentions to be without merit.

Defendants object to a number of rulings made by the Court regarding the admission and exclusion of exhibits, objections, offers of proof and mistrial motions. Defendants have failed to demonstrate prejudice in regard to these rulings, and there is no basis to grant a new trial on these issues.

Finally, defendants assert that the Court erred in allowing plaintiff to amend the complaint to allege front pay, and refused to allow a postponement for additional discovery. Defendants have failed to establish that they were prejudiced by the Court's ruling, and accordingly, there was no error in this regard.

Therefore, for the reasons given herein, defendants' motions will be denied.

II. CONTEMPT MOTION

Plaintiff made a motion during the trial to hold defendants' counsel, Donald W. Jones, in contempt of court for his statement to the jury regarding the involvement in this case of the American Civil Liberties Union, which was expressly contrary to previous rulings by the Court. The motion was taken under advisement at that time. Because the Court believes that Mr. Jones was duly admonished at the time of the incident, and because counsel did make an apology, it is the opinion of the Court that no further action is necessary. Accordingly, the motion for contempt will be denied.

III. ATTORNEYS' FEES

Turning now to the issue of attorneys' fees, under 42 U.S.C. § 1988, the Court has the discretion to allow reasonable attorney fees to a prevailing party for deprivation of constitutional rights under 42 U.S.C. § 1983.

Plaintiff has submitted a bill for total fees and expenses accrued in this case as follows: based upon 142.5 hours expended by Mr. Susman at $185.00 per hour, plaintiff requests total fees of $26,362.50 for Mr. Susman; based upon 259.2 hours expended by Mr. Allsberry at $120.00 per hour, plaintiff requests total fees of $31,104.00 for Mr. Allsberry; based upon 20.8 hours expended by a paralegal at $65.00 per hour, $1,352.00 is requested; based upon 118.6 hours expended by Ms. Hedrick at rates from $65.00-$100.00 per hour, plaintiff requests total fees of $9,924.50 for Ms. Hedrick; total expenses of St. Louis Counsel are $2,248.55; total expenses of Springfield Counsel are $267.89;

total fees of all counsel are $68,743.00 and total expenses are $2,516.44 for a final total of all fees and expenses of $71,259.44. In a supplemental motion, plaintiff has made a request for attorneys' fees for post-trial work and expenses not previously submitted as follows: total supplemental fees requested for Mr. Susman are $1,850.00 and for Mr. Allsberry are $120.00 for a total of $2,582.00; and total supplemental expenses requested are $1,327.25. The total amount requested for attorneys' fees and expenses is therefore $75,168.69.

Mr. Susman has requested that he be compensated at the rate of $185.00 per hour, which he states is his current regular hourly rate. He has substantiated his request for the $185.00 hourly rate by delineating his credentials, and supplying a list of other cases he has tried since 1984 in which he has always been awarded at least the requested fee. He states that the average fee he has been awarded in cases since 1984 is $180.21 per hour, and that the Western District of Missouri has awarded him fees of $175.00 and $185.00 per hour in the last few years.

Plaintiff has submitted the affidavit of Ms. Hedrick indicating that efforts to secure competent local counsel to take plaintiff's case were to no avail. Specifically, she states that she "spent considerable time contacting a number of lawyers in Southwest Missouri, and none felt that they could or would sue the City of Cabool, or help Mr. Casey without a substantial advance. None would take the case on a contingency fee basis." Affidavit of Peggy S. Hedrick. Ms. Hedrick states additionally that it was only after finding that Mr. Casey was ineligible

for the services of Legal Aid, and after having "exhausted local sources for obtaining an attorney," that attorneys Susman and Allsberry agreed to take the case, upon a referral from the American Civil Liberties Union in Kansas City. Aff. of Hedrick.

The initial step in determining a proper attorney fee award is calculation of a "lodestar" figure consisting of the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The amount to be awarded as reasonable attorney fees is left to the sound discretion of the district court, but the court is required to provide an explanation of its fee award. Id. at 437

The Hensley Court characterized the degree of success as the "most critical factor" in adjusting fee awards. Id. at 438. The Supreme Court has recently reiterated the importance of the degree of success in determining the reasonableness of attorney fee awards under § 1988. Farrar v. Hobby, 61 U.S.L.W. 4033 (Dec. 14, 1992). In Farrar, the Court stated that, "a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." Id. at 4036, quoting Riverside v. Rivera, 477 U.S. 561, 585 (1986) (Powell J., concurring in judgment).

Both parties have addressed Farrar, with plaintiff urging that the case should be narrowly construed to apply only to cases in which a plaintiff has received only a nominal damage award, and defendants arguing for a broader interpretation. Even if the Court accepts, arguendo, that Farrar is intended to

apply to cases other than nominal damage cases, this is not a case where the Court is inclined to exercise its discretion to ignore the lodestar analysis or to award no fees. In the instant case, plaintiff sought $67,000.00 in damages, and was awarded $18,888.00. Defendants' contentions that plaintiff was not successful on various claims or that the amount awarded should be compared with a claim for $200,000.00 are not supported by the law or evidence in this case and are without merit. The Court is persuaded that, looking first at the degree of success in this case, the award plaintiff received is sufficient to support a lodestar figure based on the reasonable fees as the Court determines those to be, multiplied by a reasonable number of hours. Plaintiff's constitutional right to freedom of speech was vindicated, and the significance of the relief he obtained, both in terms of prevailing on his claim, and in terms of the compensatory damages he was awarded, are adequate to support the lodestar amount, as determined by this Court. Accordingly, there need be no downward adjustment because plaintiff did not receive the full $67,000.00.

The Court notes, moreover, that defendants have made no showing to rebut the presumption in favor of awarding attorney's fees to a prevailing party in a § 1988 case. Defendants have not established that any "special circumstances" exist that would make the award of attorneys' fees unjust in this case. See Hatfield v. Hayes, 877 F.2d 717, 719-20 (8th Cir. 1989).

The Court must first consider the reasonableness of the hourly rate requested

by Mr. Susman. The Supreme Court has ruled that when requesting attorney fees under § 1988, fee petitioners bear the burden of demonstrating that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984). A reasonable hourly rate in federal civil rights litigation is determined by assessing the prevailing market rates in the relevant community, and a reasonable fee is "one that is 'adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys.'" Id. at 897. The Court has emphasized that the factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), should be used to establish the lodestar components.[4] Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565-66 (1986).

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[4] Johnson delineated a number of factors to be considered by a court in awarding attorney fees against a party and in determining the reasonableness of the fee. These factors are: 1) the time and labor required; 2) the novelty and difficulty of the question presented; 3) the skill required to perform the legal services; 4) the preclusion of other employment by the attorney due to the acceptance of the case; 5) the customary fee in the community; 6) whether the fee is fixed or contingent; 7) time limitations imposed by the client or circumstances; 8) the amount of damages involved and the results obtained; 9) the experience, reputation and ability of the attorneys; 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; and 12) awards in similar cases. 488 F.2d at 717-19. The Eighth Circuit Court of Appeals has relied on the Johnson factors in establishing the reasonableness of attorney fee awards. See, e.g., Herrera v. Valentine, 653 F.2d 1220, 1233 (8th Cir. 1981) (affirmed lower court's award based on Johnson factors).

It is obvious from Delaware Valley, Blum, and Johnson that the skill, experience, and reputation of counsel are key factors bearing on a rate's reasonableness, and it is therefore appropriate to give considerable attention to these particular factors. McDonald v. Armontrout, 860 F.2d 1456, 1459 (8th Cir. 1988). In this case, Mr. Susman is a successful civil rights litigator with a private practice in St. Louis. He has been in practice for 26 years, has been involved in at least several highly visible cases, and has argued a number of cases before appellate courts in several districts, as well as the Supreme Court. Accordingly, there is no question that Mr. Susman's skill, experience and reputation are of the highest caliber, and that the Court should, and will, take those factors into consideration.

Mr. Susman has indicated that $185.00 per hour is his current customary billing rate. A regular hourly billing rate is "a useful starting point for determining a reasonable fee." Id. at 1459. The Eighth Circuit has recognized, however, that an attorney's ordinary billing rate is not conclusively "reasonable," but should be compared to the customary fee for similar work in the relevant community. Shakopee Mdewakanton Sioux v. City of Prior Lake, 771 F.2d 1153, 1160-61 (8th Cir. 1985), cert. denied, 475 U.S. 1011 (1986). Defendants challenge Susman's requested rate in light of the fact that, inter alia, the fee requested by Mr. Susman is not a reasonable fee and is not commonly charged in the relevant community, i.e., either Cabool or Springfield, Missouri. They contend that the appropriate rate is $95.00 per hour. In support thereof, defendants have provided the Court with a

recent Western District of Missouri case in which an attorney in a social security case was awarded a fee of $95.00 per hour.

Blum does not define "community" and resolving this issue is a matter within the court's discretion. McDonald, 860 F.2d at 1459-60 n.6 "[N]umerous courts have held that a court may look beyond the local geographic market in considering the fair market value of an attorneys' services. A national market or a market for a particular legal specialization may provide the appropriate market." Hendrickson v. Branstad, 740 F. Supp. 636, 642 (N.D. Iowa 1990). Out-of-town counsel must not always be limited to lower local rates. Avalon Cinema Corp. v. Thompson, 689 F.2d 137, 140 (8th Cir. 1982) (en banc). A case-by-case approach is required to determine whether a plaintiff needed to seek non-local counsel. Id. In Avalon, the Eighth Circuit held that:

> It may not always be possible to find counsel in or near the locality of the case who are able and willing to undertake difficult and controversial civil-rights litigation. If 'a plaintiff can show he has been unable through diligent, good faith efforts to retain local counsel, attorney's fees under 42 U.S.C. § 1988 are not limited to the prevailing rate in the district where the case is tried.'

Id. at 140-41 (quoting Donaldson v. O'Connor, 454 F. Supp. 311, 315 (N.D. Fla. 1978) (footnote omitted).

This Court has carefully scrutinized the affidavit of Ms. Hedrick, who stated that

after contacting a number of lawyers in southwestern Missouri, she could find none that would accept plaintiff's case. Plaintiff has not alleged, as did the plaintiff in Avalon, that no competent counsel was available in the local area, but rather, that none were willing to accept his case. Therefore, this Court will accept the fact that plaintiff was unable to obtain local counsel, and that the relevant community for determining a reasonable fee is the St. Louis area. Even were the Court to decide, however, that the relevant community is southwestern Missouri, the Court is convinced that Mr. Susman should not be held to a rate of $95.00 per hour, as defendants contend.

Defendants have not demonstrated that someone of comparable experience and expertise to Mr. Susman doing similar work would be paid $95.00 per hour. See McDonald, 860 F.2d at 1460. Because the case provided by defendants to establish that rate involved a social security claimant and is otherwise inapplicable to the case at bar, the Court is not persuaded that the reasonable rate for comparable work by someone of Mr. Susman's experience in the relevant community is $95.00. On the other hand, the Court cannot say that the requested rate of $185.00 is reasonable. This case did not involve protracted litigation spanning a number of years, did not impact on civil rights issues for classes of plaintiffs, and did not involve complex, difficult or novel issues of law. Cf. Id.; Little Rock School Dist. v. Pulaski County Special School Dist. No. 1, 787 F.2d 372, 374 (8th Cir. 1986). Although these facts are in no way a reflection on Mr. Susman's ability, nor intended to disparage his success in civil rights litigation in

general or this case in particular, they are relevant to the issue of the reasonableness of a fee of $185.00 per hour. The Court notes, moreover, that Mr. Susman has not furnished support in the form of affidavits or other documents that substantiate that the hourly rate he requests is reasonable for lawyers of his experience and skill, and is charged by comparable practitioners. Cf. Sanders v. Stewart, 776 F. Supp. 458, 462 (E.D. Ark. 1991); Hollowell v. Gravett, 723 F. Supp. 107, 108 (E.D. Ark. 1989) (It is counsel's burden to "produce satisfactory evidence by attorneys of reasonable comparable skill, expertise and reputation.").

Having fully reviewed this issue, with due consideration for the various aspects of this case, the Court finds that an hourly rate in the amount of $150.00 is reasonable for Mr. Susman. First, the Court believes that comparable cases, in either the St. Louis area or in southwestern Missouri, would command a rate of approximately $125.00 per hour. Secondly, the following other relevant factors have been taken into consideration to determine a reasonable fee in this case: Mr. Susman's reputation and years of practice; the hourly rates he has previously received;[5] his expertise in civil rights litigation; and the rates applied in other recent civil

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[5] The Court notes in particular that in Hollins v. Powell, 773 F.2d 191 (8th Cir. 1985), cert. denied 106 S.Ct. 1635 (1986), one of the cases provided by plaintiff, Mr. Susman was awarded $150.00 per hour in 1984. The case is similar to the instant one in that Mr. Susman represented four plaintiffs suing a city and its mayor in St. Louis County.

rights cases. The Court concludes that Mr. Susman's services should command a fee somewhat higher than the prevailing market rate, and that $150.00 per hour is reasonable. Additionally, this award is justified by plaintiff's degree of success and the actual as well as potential results obtained. Hensley, 461 U.S. at 434; Farrar, 61 U.S.L.W. at 4036. In this case, not only was plaintiff successful on his claim, but it is likely that his case will have an effect on defendants' employment practices and the community. Farrar, 61 U.S.L.W. at 4038-39 (O'Connor, J., concurring) (public purpose served is factor to be considered in determining degree of success). For the reasons given herein, and based on the factors delineated, the Court believes it has fulfilled its responsibility of "provid[ing] a concise but clear explanation of its reasons for the fee award." Hardman v. Board of Education, 714 F.2d 823, 825 (8th Cir. 1983) (citation omitted).

The Court turns now to the reasonable hourly rates to be awarded to attorneys Allsberry and Hedrick, and for the paralegal from Mr. Susman's office. Mr. Allsberry has requested attorney's fees at the rate of $120.00 per hour, and Ms. Hedrick has billed her time at rates from $65.00-$100.00, depending on the year in which the work was performed, and whether the time was spent in or out of court. A fee of $65.00 per hour is requested for work performed by the paralegal. Defendants contend that a fee in excess of $100.00 per hour in this case is unwarranted for Mr. Allsberry. They also assert that Ms. Hedrick's trial time should be cut in whole or in part to avoid double billing, and that her fee award should be

limited to $2,200.00, based on an hourly rate of $80.00 per hour. Defendants contend, additionally, that a reasonable hourly rate for the paralegal is $30.00 per hour.

Based on the law on reasonable attorney fees, as set forth herein, the Court finds that the $120.00 hourly rate requested by Mr. Allsberry is reasonable, and that Ms. Hedrick's rates of $65.00-$100.00 an hour are likewise reasonable. Finally, legal assistant fees are compensable in the Eighth Circuit under an award of attorney's fees, Winter v. Cerro Gordo County Conservation Bd., 925 F.2d 1069, 1071 (8th Cir. 1991), and the Court finds that the hourly rate of $65.00 per hour for paralegal services for non-local counsel is reasonable.

In determining the reasonable number of hours expended, Hensley, 461 U.S. at 108, the Court has carefully scrutinized all of plaintiff's counsels' submissions in assessing the reasonableness of the amount of time plaintiff's attorney have spent on this case. In addition, the Court has thoroughly reviewed and given careful consideration to defendants' contentions regarding cutting hours for time spent on unsuccessful claims, duplication of effort, and the other reductions suggested by defendants. The Court is satisfied that the fees included in the petition represent time that plaintiff's attorneys reasonably spent on this case. Defendants' contentions to the contrary are non-persuasive, and in particular, their arguments regarding time spent on unsuccessful claims reflect a misapplication of the law. The Court does not agree that plaintiff's lawyers duplicated each other's work, and that the fee award should therefore

be reduced. Although it would be unreasonable to pay for the same work twice, it is not unreasonable to divide responsibilities as Mr. Susman and Mr. Allsberry did, nor to utilize the services of local counsel, Ms. Hedrick, who has been in the case from its inception. See Jeffers v. Clinton, 776 F. Supp. 465, 471 (E.D. Ark. 1991). The Court is of the opinion, additionally, that it is reasonable to award fees for all of the time spent at trial by plaintiff's attorneys. There are a myriad of cases in which attorneys' fees have been awarded for multiple counsel. E.g., Sanders, 776 F. Supp. at 463; Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft, 655 F.2d 848, 872 (8th Cir. 1981). Regarding reimbursement of any fees paid to date to Ms. Hedrick, plaintiff is entitled to such attorneys' fees under § 1988.

Defendants contend that counsel should not be compensated for travel time. In Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381, 396 (8th Cir. 1987), this Circuit held that the court should award fees for travel time at the full hourly rate unless such a recovery would be unreasonable. Because there is a presumption that a reasonable attorney's fee includes reasonable travel time billed at a full hourly rate, and because there is no evidence before the Court that such an award is unreasonable, the Court will award fees for travel time at the hourly rates as set forth herein.

Accordingly, the Court finds that the hours as submitted by plaintiff's attorneys for time expended on this case are reasonable and will be used to calculate the lodestar amount. The fees for the three attorneys and

one paralegal involved in this case are therefore awarded as follows: Attorney Susman, based upon 142.5 hours at $150.00 per hour for a total of $21,375.00; for Mr. Allsberry, based upon 259.2 hours at $120.00 per hour for a total of $31,104.00; for Ms. Hedrick, based upon 118.6 hours at variable rates from $65.00-$100.00 per hour, for a total of $9,924.50; and for the paralegal, based upon 20.8 hours at $65.00 per hour, for a total of $1,352.00.

Mr. Susman and Mr. Allsberry have also requested that they be reimbursed for fees incurred in preparing post-trial motions, including the fee petition. The Eighth Circuit has held that fees incurred in litigating attorneys' fees are recoverable. Jones v. MacMillan Bloedel Containers, Inc., 685 F.2d 236, 239 (8th Cir. 1982). Accordingly, plaintiff's counsel will be awarded attorneys' fees for post-trial motions and preparation of the fee petition at the same rate as the award for the case-in-chief. Those awards are as follows: for Mr. Susman, based on 10 hours at $150.00 per hour, for a total of $1,500.00; and for Mr. Allsberry, based on 6.1 hours at $120.00 per hour, for a total of $732.00.

Regarding expenses requested by plaintiff, defendants contend that several factors mandate a reduction in the fee request for expenses including, inter alia, witness fees, travel expenses, telephone calls and mileage. The law is clear in this circuit that reasonable attorney's fees under § 1988 include reasonable out-of-pocket expenses that are normally charged to fee-paying clients. Neufeld v. Searle Laboratories, 884 F.2d 335, 342 (8th Cir. 1989); Sapanajin v.

Gunter, 857 F.2d 463, 465 (8th Cir. 1988). It is within the Court's discretion to award expenses for telephone calls, postage, travel, photocopying, food, lodging, and other out-of-pocket expenses. Winter, 925 F.2d at 1074.

In this case, the Court finds that plaintiff's requests for reimbursement for expenses are reasonable and will be awarded with the exception of witness fees and certain travel and meal expenses. Specifically, defendants object to travel and meal expenses of Mr. Susman dated November 24, 1992 for $196.84 and travel expenses dated December 12, 1992 for $1,050.16. Because the Court is inclined to agree with defendants that without further breakdown or itemization, there is no indication of the reasonableness of these expenses, the request for reimbursement in the amount of $1,247.00 will be denied. Defendants also contend that plaintiff should not be compensated for witness fees for those witnesses that were not called at trial. Although plaintiff has submitted witness fees of $78.40 each for seven witnesses, he provides the name of only one witness who was paid the fee. The Court knows of no basis to pay witness fees for unidentified witnesses who were not called at trial, nor has plaintiff indicated the reasonableness of having paid the one witness, who also was not called at trial. Therefore, the Court will exercise its discretion to deny plaintiff's request for expenses for witness fees in the amount of $548.80.

Having fully reviewed the record, the Court finds that plaintiff's expenditures were otherwise made in connection with the

preparation of his case for trial, and there has been no showing that these expenditures were useless or excessive. Sanders, 776 F. Supp. at 465. Because the requests for expenses are otherwise supported by the record, it will be ordered that expenses as requested with a deduction of $1,785.80 for witness fees and travel and meal expenses are reasonable, appropriate, and should be awarded to plaintiff.

IV. CONCLUSION

For the reasons set forth herein, it is therefore

ORDERED that defendants' motion for judgment as a matter of law, or in the alternative, for a new trial be, and is hereby, denied. It is further

ORDERED that defendants' motion to amend the judgment and to reduce it by one-half, or at least by $4,000 be, and is hereby, denied. It is further

ORDERED plaintiff's motion for contempt be, and is hereby, denied. It is further

ORDERED that plaintiff's motion for attorneys' fees and expenses be, and is hereby, granted in part. Total attorneys' fees in the amount of $65,987.50 will be, and are hereby awarded, and total expenses in the amount of $2,047.89 will be, and are hereby awarded, for a total of $68,035.39.

/S/
JAMES C. ENGLAND
United States Magistrate Judge

Dated: 01/19/93

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-1262WMS	*	
	*	
John C. Casey,	*	
	*	
Appellee,	*	
	*	Order Denying Petition
vs.	*	for Rehearing and
	*	Suggestion for Rehearing
City of Cabool,	*	En Banc
Missouri, et al.,	*	
	*	
Appellants.	*	

The suggestion for rehearing en banc is denied. Judge Bowman, Judge Loken and Judge Hansen would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

April 5, 1994

Order Entered at the Direction of the Court:
(signed, Michael E. Gans)
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1262WMS	*	
	*	
John C. Casey,	*	
	*	
Appellee,	*	
	*	Order Denying Petition
vs.	*	for Rehearing and
	*	Suggestion for Rehearing
City of Cabool,	*	En Banc
Missouri, et al.,	*	
	*	
Appellants.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 13, 1994

Order Entered at the Direction of the Court:
(signed, Michael E. Gans)
Clerk, U.S. Court of Appeals, Eighth Circuit

ADMINISTRATIVE PROCEDURE ACT

CHAPTER 536 REVISED STATUTES OF MISSOURI

536.010 Definitions. For the purpose of this chapter:

(1) **"Agency"** means any administrative officer or body existing under the constitution or by law and authorized by law or the constitution to make rules or to adjudicate contested cases;

(2) **"Contested case"** means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after a hearing;

(3) The term **"decision"** includes decisions and orders whether negative or affirmative in form . . . .

536.060 Informal Disposition of Case by Stipulation--Summary Action--Waiver. Nothing contained in §§ 536.060 to 536.095 shall preclude the informal disposition of contested cases by stipulation, consent order, or default, or by agreed settlement where such settlement is permitted by law. Nothing contained in §§ 536.060 to 536.095 shall be construed (1) to impair the power of any agency to take lawful summary action in those matters where a contested case is not required by law, or (2) to prevent any agency authorized to do so from assisting claimants or other parties in any proper manner, or (3) to prevent the waiver by the parties (including, in a proper case, the agency) of procedural requirements which would otherwise be necessary before final decision, or (4) to prevent stipulations or agreements among the

parties (including, in a proper case, the agency).

536.063 Contested Case, How Instituted--Pleadings--Copies Sent Parties. In any contested case:

(1) The contested case shall be commenced by the filing of a writing by which the party or agency instituting the proceeding seeks such action as by law can be taken by the agency only after opportunity for hearing, or seeks a hearing for the purpose of obtaining a decision reviewable upon the record of the proceedings and evidence at such hearing, or upon such record and additional evidence, either by a Court or by other agency. Answering, intervening and amendatory writings and motions may be filed in any case and shall be filed where required by rule of the agency, except that no answering instrument shall be required unless the notice of institution of the case states such requirement. Entries of appearance shall be permitted.

(2) Any writing filed whereby affirmative relief is sought shall state what relief is sought or proposed and the reason for granting it, and shall not consist merely of statements or charges phrased in the language of a statute or rule; provided, however, that this subdivision shall not apply when the writing is a notice of appeal as authorized by law.

(3) Reasonable opportunity shall be given for the preparation and presentation of evidence bearing on any issue raised or decided or relief sought or granted. Where issues are tried without objection or by consent, such issues shall be deemed to have been properly before the agency. Any

formality or procedure may be waived by mutual consent.

(4) Every writing seeking relief or answering any other writing, and any motion shall state the name and address of the attorney, if any, filing it; otherwise the name and address of the party filing it.

(5) By rule the agency may require any party filing such a writing to furnish, in addition to the original of such writing, the number of copies required for the agency's own use and the number of copies necessary to enable the agency to comply with the provisions of this subdivision hereinafter set forth. The agency shall, without charge therefor, mail one copy of each such writing, as promptly as possible after it is filed, to every party or his attorney who has filed a writing or who has entered his appearance in the case, and who has not theretofore been furnished with a copy of such writing and shall have requested copies of the writings; provided that in any case where the parties are so numerous that the requirements of this subdivision would be unduly onerous, the agency may in lieu thereof (a) notify all parties of the fact of the filing of such writing, and (b) permit any party to copy such writing . . . .

536.090 Decisions in Writing--Notice. Every decision and order in a contested case shall be in writing, and, except in default cases or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which

the agency bases its order. Immediately upon deciding any contested case the agency shall give written notice of its decision by delivering or mailing such notice to each party, or his attorney of record, and shall upon request furnish him with a copy of the decision, order, and findings of fact and conclusions of law . . . .

536.100 Party Aggrieved Entitled to Judicial Review. Any person who has exhausted all administrative remedies provided by law and who is aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review thereof, as provided in §§ 536.100 to 536.140, unless some other provision for judicial review is provided by statute; provided, however, that nothing in this chapter contained shall prevent any person from attacking any void order of an agency at any time or in any manner that would be proper in the absence of this section. Unreasonable delay on the part of any agency in deciding any contested case shall be grounds for an order of the Court either compelling action by the agency or removing the case to the Court for decision.

536.110 Petition, When Filed--Process--Venue.

1. Proceedings for review may be instituted by filing a petition in the circuit court of the county of proper venue within thirty days after the mailing or delivery of the notice of the agency's final decision.

2. Such petition may be filed without first seeking a rehearing, but in cases where

agencies have authority to entertain motions for rehearing and such a motion is duly filed, the thirty-day period aforesaid shall run from the date of the delivery or mailing of notice of the agency's decision on such motion. No summons shall issue in such case, but copies of the petition shall be delivered to the agency and to each party or record in the proceedings before the agency or to his attorney of record, or shall be mailed to the agency and to such party or his said attorney by registered mail, and proof of such delivery or mailing shall be filed in the case.

3. The venue of such cases shall, at the option of the plaintiff, be in the circuit court of Cole County or in the county of the plaintiff or of one of the plaintiff's residence or if any plaintiff is a corporation, domestic or foreign, having a registered office or business office in this state, in the county of such registered office or business office. The Court in its discretion may permit other interested persons to intervene. . ..

536.130 Record on Judicial Review.

1. Within thirty days after the filing of the petition or within such further time as the Court may allow, the record before the agency shall be filed in the reviewing court. Such record shall consist of any one of the following:

(1) Such parts of the record, proceedings and evidence before the agency as the parties by written stipulation may agree upon;

(2) An agreed statement of the case, agreed to by all parties and approved as correct by the agency;

(3) A complete transcript of the entire record, proceedings and evidence before the agency. Evidence may be stated in either question and answer or narrative form. Documents may be abridged by omitting irrelevant and formal parts thereof. Any matter not essential to the decision of the questions presented by the petition may be omitted. The decision, order and findings of fact and conclusions of law shall in every case be included.

2. The record filed in the reviewing court shall be properly certified by the agency, and shall be typewritten, mimeographed, printed, or otherwise suitably reproduced. In any case where papers, documents or exhibits are to be made a part of the record in the reviewing court, the originals of all or any part thereof, or photostatic or other copies which may have been substituted therefor, may, if the agency permits, be sent to the reviewing Court instead of having the same copied into the record.

3. In any case where any party fails or refuses to agree to the correctness of a record, the agency shall decide as to its correctness and certify the record accordingly. If any party shall be put to additional expense by reason of the failure of another party to agree to a proper shortening of the record, the Court may tax the amount of such additional expense against the offending party as costs.

4. The record to be filed in the reviewing court shall be filed by the plaintiff, or at the request of the plaintiff shall be transmitted by the agency directly to the clerk of the reviewing court and by him

filed; provided, that when original documents are to be sent to the reviewing Court they shall be transmitted by the agency directly, as aforesaid. The Court may require or permit subsequent corrections of or additions to the record.

536.140 Scope of Judicial Review--Judgment--Appeals.

1. The Court shall hear the case without a jury and, except as otherwise provided in subsection 4, shall hear it upon the petition and record filed as aforesaid.

2. The inquiry may extend to a determination of whether the action of the agency

(1) Is in violation of constitutional provisions;

(2) Is in excess of the statutory authority or jurisdiction of the agency;

(3) Is unsupported by competent and substantial evidence upon the whole record;

(4) Is, for any other reason, unauthorized by law;

(5) Is made upon unlawful procedure or without a fair trial;

(6) Is arbitrary, capricious or unreasonable;

(7) Involves an abuse of discretion.

The scope of judicial review in all contested cases, whether or not subject to judicial review pursuant to §§ 536.100 to 536.140, and in all cases in which judicial review of decisions of administrative officers or bodies, whether state or local, is now or may hereafter be provided by law, shall in all cases be at least as broad as the scope of judicial review provided for in this subsection; provided, however, that nothing herein contained shall in any way change or

affect the provisions of §§ 311.690 and 311.700, RSMo.

3. Whenever the action of the agency being reviewed does not involve the exercise by the agency of administrative discretion in the light of the facts, but involves only the application by the agency of the law to the facts, the Court may weight the evidence for itself and determine the facts accordingly. The law applied by the agency as aforesaid may include the agency's own rules. In making such determination the Court shall give due weight to the opportunity of the agency to observe the witnesses, and to the expertness and experience of the particular agency.

4. Wherever under subsection 3 or otherwise the Court is entitled to weigh the evidence and determine the facts for itself, the Court may hear and consider additional evidence if the Court finds that such evidence in the exercise of reasonable diligence could not have been produced or was improperly excluded at the hearing before the agency. Wherever the Court is not entitled to weigh the evidence and determine the facts for itself; if the Court finds that there is competent and material evidence which, in the exercise of reasonable diligence, could not have been produced or was improperly excluded at the hearing before the agency, the Court may remand the case to the agency with directions to reconsider the same in the light of such evidence. The Court may in any case hear and consider evidence of alleged irregularities in procedure or of unfairness by the agency, not shown in the record.

5. The Court shall render judgment affirming, reversing, or modifying the agency's order, and may order the reconsideration of the case in the light of the Court's opinion and judgment, and may

order the agency to take such further action as it may be proper to require; but the Court shall not substitute its discretion for discretion legally vested in the agency.

6. Appeals may be taken from the judgment of the Court as in other civil cases.

536.150 Review by Injunction or Original Writ, When--Scope.

1. When any administrative officer or body existing under the constitution or by statute or by municipal charter or ordinance shall have rendered a decision which is not subject to administrative review, determining the legal rights, duties or privileges of any person, including the denial or revocation of a license, and there is no other provision for judicial inquiry into or review of such decision, such decision may be reviewed by suit for injunction, certiorari, mandamus, prohibition or other appropriate action, and in any such review proceeding the Court may determine the facts relevant to the question whether such person at the time of such decision was subject to such legal duty, or had such right, or was entitled to such privilege, and the Court may determine whether such decision, in view of the facts as they appear to the Court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion; and the Court shall render judgment accordingly, and may order the administrative officer or body to take such further action as it may be proper to require; but the Court shall not substitute its discretion for discretion legally vested in such administrative officer or body, and in cases where the granting or withholding of a privilege is committed by law to the sole

discretion of such administrative officer or body, such discretion lawfully exercised shall not be disturbed.

2. Nothing in this section shall apply to contested cases reviewable pursuant to §§ 536.100 to 536.140.

3. Nothing in this section shall be construed to impair any power to take summary action lawfully vested in any such administrative officer or body, or to limit the jurisdiction of any Court or the scope of any remedy available in the absence of this section.

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